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English reports -
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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
ECCLESIASTICAL COURTS
AT
Doctors' Commons.

BY W. C. CURTEIS, LL.D.
ADVOCATE.

VOL. II.

CONTAINING CASES FROM HILARY TERM 1839, TO
MICHAELMAS TERM 1841, INCLUSIVE.

LONDON:
SAUNDERS AND BENNING, LAW BOOKSELLERS,
(SUCCESSORS TO J. BUTTERWORTH AND SON,)
43, FLEET STREET.

1842.

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ERRATA.

Page 2 line 25, after "requisite" insert a comma.

" 223 — 23, *dele* "not."

" 224 — 6, for "*Addams*" read "*Haggard*."

" 258 — 6, read "acceptor."

" 266 — 12, read "assessed."

" 641 — the conclusion of the marginal note should read,
"though more liberally than between party
and party."

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Doctors' Commons.

PREROGATIVE COURT OF CANTERBURY.

See Allen v Bradshaw. V. 1. p 110. con: Cooper v Thompson. Nq. C. v. 1. p 252

GEORGE against RIELLY.

1839.

THIS was a question as to the admission of an allegation propounding a paper as the will of Ann Watkins, wife of Thomas Watkins.

HILARY TERM.
Jan. 16th.

The deceased, under her marriage settlement, had a power of disposing of certain sums of money "by her last will and testament, or any codicil, or codicils thereto, or any writing or writings of a testamentary nature, to be signed and published by her in the presence of, and to be attested by, two or more credible witnesses." The paper propounded, after referring to the settlement, and giving certain

A power in a married woman, to dispose of personality by will "to be signed and published by her in the presence of, and to be attested by two or more credible witnesses," is not duly exercised by an instrument signed and

sealed in the presence of two witnesses, the attestation clause being

Witnesses to the }
execution hereof }

Evidence aliunde that publication took place not being admissible.

1839.
 HILARY TERM.
 Jan. 16th.

GEORGE
 against
 RIELLY.

legacies, concluded, "In witness whereof, I have hereunto set my hand and seal, this 22d day of January 1834.

Witnesses to the }
 execution hereof }

The mark of
 ✕
 ANN WATKINS.

EDWARD SALVAGE.
 CH. E. SMITH.

Addams, opposed the allegation, and contended that under the case of *Allen v. Bradshaw*, (a) and the cases there referred to, this was not a due execution of the power.

Curteis in support of the allegation.

The allegation pleads that Ann Watkins, the deceased, having the power of making a will, to be signed and published by her, in the presence of two witnesses, who are to attest her so doing,—did sign and publish her will, accordingly, and that the witnesses attested that she did so—and the question is, whether the attestation clause is sufficient to let in proof of the facts. The case differs from that of *Allen v. Bradshaw*; in that case, signing and publishing were required by the power, but the witnesses only attested the signing, the attestation clause was "witnesses to the signature" thereby excluding the other requisite publication, as *expressio unius est exclusio alterius*; but in the present case, the attestation is in general terms, "witnesses to the execution hereof," that must include all that

(a) Vol. I. p. 110.

was necessary to the execution, the execution thereof must include publication, as without publication there could be no execution: and in the case of *Doe dem Spilsbury v. Burdett*, (a) the Court of Queen's Bench held that the simple attestation witness, A. B., &c., was sufficient to include publication, as well as signing and sealing, and it is submitted that the present is a similar case.

1839.

HILARY TERM.
Jan. 16th.GEORGE
against
RIELLY.

SIR HERBERT JENNER,

After stating the contents of the allegation, proceeded.—The paper concludes, “In witness whereof, I have hereunto set my hand and seal this 22d of January 1834,” then follows “the mark of Ann Watkins,” and a mark, stated to be in the handwriting of the deceased, and two witnesses sign their names, as attesting “the execution thereof.” What do the witnesses purport to attest by this clause? The execution thereof. What is the execution thereof? The setting of her hand and seal by the deceased to the paper. But setting hand and seal does not include publication; there must be some act to denote publication, beyond the mere signing and sealing. Is there anything in the manner of execution which takes this case out of the principle which applies to such cases? I am of opinion that there is not. All that the witnesses attested was the execution, and that does not include publication, and, according to all the cases here and elsewhere, where the execution is on the face of it defective, the defect cannot be supplied by parol evidence. The case of *Spilsbury v. Bur-*

have is this reason
cited with the judgment
in *Cooper v. Thompson*
pre cited Dec 23 18

(a) 4 Ad. & Ell. p. 1.

1839.
HILARY TERM.
Jan. 16th.
GEORGE
against
RIELLY.

dett, in the Court of Queen's Bench, is somewhat different from the cases in the other Courts ; but in that case, the deceased, in the beginning of the will, published and declared it to be her last will and testament, and the whole reasoning of Lord Denman is founded upon the terms of the instrument itself ; on the face of the will, the Court held that there had been a publication, and, consequently, a due execution of the power ; but in this case there is no notice of publication, but a mere signing and sealing ; there is, therefore, a distinction between the cases, even if that case had the effect of a decided case, whereas it remains to be determined, it being under appeal to the Exchequer Chamber. (a)

I am of opinion that it would be to no purpose to admit this allegation, because, there being no evidence of publication, under such an attestation clause, the will could not be pronounced for.

Allegation rejected.

(a) The judgment was afterwards reversed in the Exchequer Chamb. 9 Ad. & Ell. 936.

CONSISTORY COURT OF LONDON.

**SPRY *against* THE DIRECTORS AND GUARDIANS OF
THE POOR OF ST. MARYLEBONE.**

1839.

HILARY TERM.
Jan. 18th.

THIS was a question as to the admissibility of a libel in a suit for subtraction of Burial Fees, or Dues, brought by the Rev. J. H. Spry, D.D. the rector of St. Marylebone, against the Directors and Guardians of the Poor of the Parish.

Libel for subtraction of burial fees, rejected. The fees not being ancient customary fees; nor having been "*settled and fixed*" by the vestrymen of the parish (Marylebone) under the local stat. 51 Geo. 3. c. 151, sec. 49.

The libel pleaded:—

First, The institution and induction of Dr. Spry to the rectory and parish of St. Marylebone, &c., that he was entitled to all the burial fees payable in and throughout the said parish, with the exception only of such as are payable on interments in vaults for the burial of the dead, constructed under two of the district churches built in the same.

Second, That a customary fee of one shilling and sixpence to the minister, of one shilling to the clerk, and of one shilling to the sexton, of the said parish, had been payable out of the poor rates, on the interment of every pauper buried at the expense of the said parish, in the then cemeteries or burial-grounds of the parish, for at least upwards of a century prior to the making and passing of the

Held, that, as the vestrymen had not exercised the power given them by the 49th section of the Act to settle and fix a rate of fees for the new burial ground of the parish (being the fees in question) *there were no fees legally existing*; although the 50th section of the Act declares that the

vestrymen shall not be enabled to reduce the rate of fees for the new burial ground below that for burials in the (then) present cemeteries of the parish.

1839.
 HILARY TERM.
 Jan. 18th.
 —
 SPRY
 against
 The Directors
 and
 Guardians
 of
 MARYLEBONE.

Act of the 51st of Geo. 3, chap. 151, after mentioned.

That, in and by a table of burial fees for the said parish, settled in vestry, in 1733, and duly confirmed by the then vicar-general and official principal of the diocese. Such fees are recited to be due to the minister, clerk, and sexton, on pauper interments, respectively, as in and by the said table now affixed up in the church, or vestry-room, (to be produced, if necessary, at the hearing of the cause) will appear.

Third, That the fees due, &c., as aforesaid, were, from time to time paid to the several persons entitled thereto, by the churchwardens or overseers of the poor of the said parish, until superseded in the management of the poor, by a Board constituted for that express purpose, to be directors and guardians of the poor of the said parish, under and in virtue of the Act, 35th Geo. 3, c. 73. That ever since the passing of that Act, the said fees have been paid by the directors and guardians to the several parties entitled to such fees, instead of by the churchwardens and overseers, as before the passing of the Act, and until the period hereinafter mentioned.

Fourth, That a new cemetery, or burial-ground, for the parish, was provided in virtue of, the stat. 46th Geo. 3, c. 124, and 51st Geo. 3, c. 151,—that ever since the consecration thereof, the interment of all paupers who are buried at the expense of the parish, has been in such new cemetery, or burial-ground. That the vestrymen of the said parish are empowered (but which power they have hitherto not exercised) by the 49th section of the 51st Geo. 3, to settle and fix the rates of fees for

burials of the dead, in the new cemetery, but nevertheless, with a proviso, under the 50th section of the Act, that such, their power should not extend to any reduction of the rates, or fees, payable for every burial in such new cemetery, below those payable for burials in the then present cemeteries of the said parish.

Fifth, The refusal by the Board of directors and guardians to pay Dr. Spry the amount of fees sued for.

Sixth, Seventh, Eighth, the usual Articles.

The admission of the libel was opposed on the 18th of December, 1838, by

The Queen's Advocate and Phillimore.

In the first place, this Court has no jurisdiction; the fees are claimed under the local act, but that act gives no power to the Ecclesiastical Court to enforce payment of the fees.

The fees, in question, are stated to be customary fees, but on the face of the libel, which alleges that the fees had been paid out of the poor-rate (which originated at the end of the reign of Elizabeth) the custom is not an immemorial one, and, therefore, is not legal and valid; and the table of fees referred to cannot carry the case further, for the parishioners in vestry had no power to bind their successors, nor had the vicar-general, or chancellor, authority to confirm such new fees. When the legislature gave the directors power to settle a rate of fees not below those payable at the old cemetery, they must have meant fees legally payable—fees which might be demanded and enforced, not fees paid under a

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misapprehension. Further, if the fees now claimed were legal, they ought to be paid to the person who actually performs the service.

Addams and Curteis in support of the libel.

The first question is as to the jurisdiction.

The Court has jurisdiction to enforce payment of a burial fee,—an accustomed fee, not claimed under any act of parliament, by reason of its nature; and the local act here recognizes Dr. Spry's right to the fee. The whole question turns upon the word "payable," in the act of 51st Geo. 3. Were these fees payable at the time the act passed?

We plead, that they had been payable for upwards of a century before the passing of the Act, and that, in a table of fees, confirmed by the then Chancellor, in 1733, these fees are recited. It is said that the Chancellor had no authority to establish new fees—but these fees were payable before, they were not then made for the first time. The Chancellor, however, has some authority with regard to fees, for, in the *Holborn case*, (a) Lord Stowell dealt with burial fees, and settled a table after much consideration. These fees being payable before the act of 51st Geo. 3, that Act empowers the vestrymen to settle and fix a rate of fees for the new cemetery; such rate, however, not to be lower than that for the old burial-ground, the vestrymen never having fixed any rate of fees, (or rather not having increased the fees as the act enabled them

(a) *Gilbert v. Buzzard and Boyer*, 2 Cons. Rep. 333, S. C. 3 Phil. 335.

to do) it must have been intended by the Act, that, until that was done, the old table of fees should be in force. The Court might, possibly, have some difficulty in enforcing the fee, (a) but if pronounced for, the directors, it is hoped, would relinquish their conscientious scruples, and pay it, as they have paid the clerk's and sexton's fees.

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JUDGMENT.

DR. LUSHINGTON,

THE first question is, what jurisdiction has the Ecclesiastical Court over the subject? It is clear that these Courts have been permitted to exercise some jurisdiction, because the Courts of Common Law, in cases where prohibition has been moved for, have not granted such prohibition, on the general ground, that the Ecclesiastical Courts were wholly incompetent to hold pleas of the subject-matter; but on especial grounds,—as, because no

Jurisdiction of
the Court as to
burial fees.

(a) The citation in this case was taken out against "The directors and guardians of the poor of the parish of St. Marylebone, in the county of Middlesex." The citation having been returned, an appearance was entered as follows:—Fielder appeared for Thomas Thorne, the nominee, or substitute, of the directors and guardians of the poor of the parish of St. Marylebone, (constituted under the provisions of a certain act of parliament, passed in the 35th year of the reign of Geo. 3, chap. 78) the parties cited and exhibited proxy under the hands and seals of Alfred Daniel, Sylvester Sapsford, William Kinsitt, Thomas Langham, Thomas Potter, Stephen Grange, Charles Skinner, William Artand, and Julius Anderson, the committee of the said directors and guardians duly appointed for the purpose of nominating and appointing such nominee or substitute, at a special general meeting of the said directors and guardians for the purposes of this suit, and the said Fielder then brought in extract from the general minutes of the said directors and guardians of the appointment of the said committee, and of the substitution of the said Thomas Thorne, and prayed a libel."

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service was rendered as the foundation of a fee: as in *Burdeaux v. Lancaster* (a) where a christening fee was claimed when the child was not baptized in the parish; and in *Topsall v. Ferrers*, (b) where a burial fee was sued for when the corpse was not buried in the parish. Prohibition has been also granted, because the fee was not accustomed, and certain, and the Ecclesiastical Court could not try the custom where it was denied. The granting prohibition for such especial reasons establishes the jurisdiction, admits it to exist, and avoids the particular exercise of it, for special reasons. This is shown by the *Dean and Chapter of Exeter's case* (c). Some jurisdiction is recognised by the Statute *Circumspecte Agatis*. Court fees, and fees to proctors, stand on a different foundation, and payment cannot be enforced in the Ecclesiastical Court.

It is necessary, therefore, that I should look to the limitations affixed to this jurisdiction, and see whether the particular fees sued for fall within any of the restrictions prescribed by Courts of Common Law. So far as I can discover, from the cases, and the authority of Mr. Justice Blackstone, (d) this Court is allowed to enforce payment of ecclesiastical dues, that is, fees due to the clergy for spiritual duties, such fees being due by custom, and the duty being actually performed. By customary fees, are meant such fees as have existed so long, that the origin cannot be traced; it need not be shewn that they commenced before the time of legal memory; it is sufficient to show that they have existed, so far as

(a) 1 Salk. 332.

(b) Hob. 175.

(c) 1 Salk. 333.

(d) 3 Com. b. 3, c. 7.

can be discovered. The foundation of all such fees is, that they were originally given voluntarily. Customary burial-fees of this nature, therefore, may be sued for here, at least, until the custom has been denied, and prohibition moved for *propter defectum triationis*; I do not consider that the Court is bound, under such circumstances, to prohibit itself. The whole subject, however, is not without difficulty; for it is admitted that no such suit has been brought for a hundred years last past, and I can find nothing in the books as to who are liable for these fees, whether the legal personal representative of the deceased, or any one else.

Having thus endeavoured to ascertain the extent of jurisdiction conceded to this Court, I am next to inquire, whether the fees, in question, fall within the limits which the Courts of Common Law have prescribed.

The first consideration is, whether these fees can be considered as ancient customary fees; or whether, by reason of the Acts of Parliament, they can be brought within the same principles.

To proceed step by step: suppose that the fees sued for were for burial in the ancient burial-ground, received for about one hundred years; are these ancient customary fees within the definition applied to them by the Courts of Law? I apprehend not; for, in the first place, they are not even alleged to be immemorial fees; and, secondly, they are alleged to have been paid out of the poor-rates, which disproves their ancient origin.

Then, could the approval of the existing chancellor bestow on these fees a legal character, so as to make them recoverable here? I think that the

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whole of the authorities show that no such power exists,—I mean, a power in the Chancellor of a diocese to create new fees for common burial. How far such authority could constitute fees in cases not of common burial, is a question I am not called upon to discuss: all I say is, that a Chancellor cannot, by his own authority, create a new fee for common burial.

But there is another ground, which, if I rightly understood the argument of one of the learned counsel, was much insisted upon; it is said that this demand rests specially on the Acts of Parliament. Let us consider how this part of the case stands.

The ground in question appears to have been purchased under An act passed in the 46th Geo. 3, since repealed. In this Act I do not find anything which could apply to the question. The Act which governs this case, appears to me (for I do not pretend to be conversant with the code which forms the special constitution of the parish of St. Marylebone) to be the 51 Geo. 3, c. 151. I have looked through this Act carefully. By the 33d section, the ground, which had been purchased under the 46th Geo. 3, when consecrated, is to be a burial-ground for the parish. By the 41st section, a minister is to be appointed for the burial of the dead in this ground. The 49th section is in these words: “it shall and may be lawful, to and for the said vestrymen, at any of their meetings, to be held in pursuance of this Act, to settle and fix the rates and fees of burial of the dead in the vaults of the said new church, and of all and every the chapels to be erected and built, by virtue of this

act, and in the said intended cemetery, or burial-ground, and in the vaults under the same; and shall and may, from time to time, make such rules, orders, and regulations, relative to and concerning burials, and for keeping the said new church, chapel, and vaults, and the vaults of the said cemetery, or burial-ground, and any other buildings, works, and conveniences to be erected and provided by virtue of this Act, in good and sufficient repair and amendment; and may from time to time alter and amend the said rates and fees, and make such other rules, orders, and regulations, in and concerning the premises, as to the said vestrymen shall appear reasonable, necessary, and convenient." The power, however, of thus settling and fixing the rates and fees for burial of the dead is not given without some limitation, for the 50th section provides, "That nothing herein contained shall extend, so as to enable the said vestrymen to reduce the rate or fees, to be payable for every burial in the vaults of the said new church, and chapels, and in the said intended cemetery, or burial-ground, or in the vaults under the same, to less sums than are now payable, according to the classes or divisions of the said vaults, cemetery, or burial-ground, for burials in the present cemeteries of the said parish; but the same shall be due, and payable to, and may be demanded, and taken by the person or persons entitled thereto."

Now it is expressly pleaded in the libel, that the vestrymen have never exercised the power conferred by the 49th section. If so, what then, are the fees now legally payable? This appears to me to dispose of the whole question. Does it necessarily follow that, on the vestrymen neglecting to

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exercise their power, the fees taken in the ancient burial-ground are the fees to be taken in the new? The Act does not say so; it does not provide that, if no fees be settled and fixed, the old fees of other grounds shall be the legal fees of the new. The burial-ground itself, the fees for burial,—everything belonging to it,—all are the creation of the Act of Parliament; where the Act is silent or defective, this Court cannot supply the absence of enactment, except where legal consequences necessarily follow, from something done by the Act, which is not the present case. The Act of Parliament has provided a proper mode of proceeding, and the vestrymen have neglected to comply with it. In case of non-compliance, the Act does nothing: on what principle, then, could the old fees be considered legal for the new burial-ground?

Under these circumstances, I cannot say that there are any fees legally existing at all. The matter, I apprehend, is not without a remedy: if the vestrymen have neglected to exercise the power given them by the 49th section of the act, a *mandamus* may issue, to compel them to fix the rates and fees.

If the case rested here, I should feel that there was an insuperable bar *at present* existing to my enforcing payment of these fees; but this is not my only difficulty.

The Act does not, directly or indirectly, give this Court jurisdiction; it does not even say how payment is to be enforced. This Court having jurisdiction only over ancient and customary fees, I should feel great difficulty in extending that power

Query,
Whether the
Ecclesiastical
Court has
power to en-
force payment
of burial fees
under the local
Act, 51st
Geo. 3, c. 151.
The Act not
having given the Court jurisdiction.

to the present case. I observe, also, that it would not be without some embarrassment that I should come to the conclusion, who is the person entitled to receive the fees; for, by the words of the Act, a minister was to be appointed specially to perform the burial service. Here is no specification of the person who is to take the fees, except that they are due and payable only for the actual performance of the service. I do not give any opinion against Dr. Spry's right; I only say, that the Act has left the subject, in some degree, vague and doubtful.

For these reasons, I am under the necessity of dismissing the defendants from the present suit; but I cannot do so without noticing a point of an entirely different description;—I mean the form of the suit, and the parties cited. The suit is against the Directors and Guardians of the Poor; but it is not pleaded that they are a legally constituted corporation, and I can find no clause in the Act which allows them to be sued in the name of their clerk. I find, indeed, that by the 12th section of 51 Geo. 3, the vestrymen may sue or be sued in the name of their clerk; but the vestrymen are not the directors. The present is a most anomalous proceeding in every respect. The party defendant in the cause is the nominee of a committee; suppose I were of opinion that the fees were due and that I had jurisdiction to compel their payment, how could I enforce my decree against such a defendant? It is not necessary that I should decide this point, but I should take a long time to pause and consider before I went the length of pronouncing this gentleman in contempt, if he refused to pay the fees, and cause a *significavit* to issue, in order that he

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might be taken and confined. This objection was not taken in the argument, but it is one of no small weight.

For these reasons, I feel bound to reject the libel and to dismiss the defendants; but I give no costs: it is not a case in which costs ought to be given, for the matter appears to have been left in so unsettled a state by the parish itself, that the clergyman was compelled to come before a Court to ascertain his rights.

ARCHES COURT OF CANTERBURY.

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Divorce for
Adultery.

No direct proof,
but proof in-
ferred from the
conduct of the
wife and the
person with
whom the adul-
tery was alleged
to have taken
place, and from
the letters of
the wife to him
found in his
repositories.

GRANT v. GRANT.

THIS was a suit brought by letters of request from the Commissary of the Bishop of Winchester, for the parts of Surrey, by Captain Alexander Grant, of Brighton, in the diocese of Chichester, against Maria Theresa, his wife, of St. Mark, Kennington, in the county of Surrey, and diocese of Winchester, for a separation by reason of adultery.

The libel pleaded the marriage of the parties, on the 20th of August 1825, at Madras, in the East Indies, their cohabitation in India, China, and England, till February, 1838, and the birth of six children. It pleaded that Captain Grant and his wife sailed from Macao, in China, on board the ship *Lord Lowther*, of which he was the owner, but the command of her was given by him to Arthur Vincent, formerly

in the service of the East India Company; that shortly after the ship left Macao, Captain Vincent (who previous to taking the command of her, had been only slightly acquainted with Captain Grant and his wife) began to pay particular attention to Mrs. Grant, who encouraged and appeared pleased therewith, so that they soon became upon a very intimate and familiar footing with each other; that frequently, during the voyage, from such time, Captain Vincent and Mrs. Grant sought occasions of being alone, and were alone together, unknown to Captain Grant, in the cuddy, and also in the dressing and sitting cabins of Mrs. Grant, and in other parts of the ship, particularly at times when Captain Grant was walking the deck, which he was in the daily habit of doing for hours at a time, or had retired to sleep (as was also his daily habit) in his sleeping cabin, after dinner; that, on some occasions, when alone together, Captain Vincent and Mrs. Grant were observed sitting close to, and in earnest conversation with each other, and appeared much embarrassed and confused on finding that they were so observed; that on other occasions, Captain Vincent was seen kissing and taking personal liberties with Mrs. Grant, and that the whole conduct and demeanour of the parties towards each other soon became, and was such, as to attract the notice of, and be the topic of conversation amongst the mariners and others on board the ship: and that on some such occasions, they committed adultery. It further pleaded that a day or two previous to the ship's arrival off Brighton, in November, 1837, Mrs. Grant said to Captain Vincent, in the presence of Margaret Jamieson, her nursery maid, that she

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should like to hear from him how he found his intended bride (he being engaged to be married on his return to England), when he got on shore, and that shortly after Mrs. Grant told Jamieson that Captain Vincent had promised to write her a letter containing the required information, but that, as Captain Grant did not like Captain Vincent, she had begged him to enclose such letter under care to her, Jamieson ; that whilst at the Norfolk Hotel, Brighton, where Captain and Mrs. Grant stayed for a few days after landing, previous to their occupation of a house in Regency Square, Brighton, Margaret Jamieson received a letter addressed to Mrs. Grant, enclosed in a blank cover addressed to herself, and delivered the same to Mrs. Grant, which letter came from Captain Vincent, as Mrs. Grant afterwards admitted to Jamieson, and that it was unknown to her husband. It further pleaded that Captain Vincent went to Brighton on the 20th of December, 1837 ; that he slept at the Albion Hotel there, and about eleven or twelve o'clock on the following day, proceeded to the house of Captain Grant, in Regency Square, he being absent therefrom, in London ; that Captain Vincent being so told, inquired for Mrs. Grant, and was shown up into the drawing-room, where she was ; that from such time until dinner time (six o'clock) on that day, the parties were for the most part alone together, either in that room, or in the back drawing-room adjoining thereto, and communicating therewith by folding doors, into which back drawing-room a sofa, which usually stood in the front drawing-room, was removed by Mrs. Grant's orders, between one and two o'clock on that day ; and it pleads that

on that occasion they committed adultery. It pleaded further, that about four o'clock in the afternoon of the same day, the footman, going up stairs with a lighted lamp, saw Captain Vincent, Mrs. Grant, and her youngest child (aged four years) in Mrs. Grant's bed-room, the door being open, and about half an hour before dinner, he went into the front drawing-room to see that the fire and lamp were burning, when Captain Vincent and Mrs. Grant were not in that room, but were seen by the servant sitting together on the sofa in the back drawing-room, where there was neither fire nor lamp, Captain Vincent's arm being round the waist of Mrs. Grant; that Captain Vincent dined at the house that day, spent the evening and slept there, and for the purpose of his so doing, Mrs. Grant hired a French bed for the night, and had it put up in the dressing-room of Captain Grant, which was below stairs; and that they then committed adultery. It pleaded that, next morning, Captain Vincent and Mrs. Grant breakfasted alone together in the back drawing-room, where they remained till about two o'clock, when Captain Vincent left Brighton for London; and that on this occasion the parties committed adultery. It further pleaded that Captain Grant, on his return to Brighton, a few days afterwards, was informed that Captain Vincent had dined at his house, but not that he had slept there, and that Captain Grant being about to settle an account with the person from whom the French bed had been borrowed, Mrs. Grant sent word to her not to include it in her account, promising to pay for its hire herself, which she accordingly did. It pleaded that on or about the 18th

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of January, 1838, Mrs. Grant, with the consent of her husband, wrote, and sent by the post, a letter (No. 1) to Captain Vincent, congratulating him on his recent marriage, which letter was addressed to him at the Jerusalem Coffee House, Cornhill, that on the 8th of February, Captain Grant being at the said Coffee House, on business, in consequence of receiving no answer to the aforesaid letter, examined the pigeon-holes, and therein found the said letter, with three others (Nos. 2, 3 & 4,) addressed to Captain Vincent in the handwriting of his wife; that he took possession of them and upon opening and perusing them, he was astonished and distressed at their contents, and was observed to be in a state of great agitation. The four letters (with a notarial translation of such parts as are in the French language) were annexed to the libel; they are as follows.

EXHIBIT, No. 1.

5 Regency Square
January 1838

My dear Captⁿ Vincent

I am very much rejoiced to hear of your marriage and wish you and your Wife all the happiness that it is possible to possess in this world, my husband participates in my feelings towards you, and I need not say how happy I should be to give you a comfortable room if you could make it convenient to pass through Brighton, *accompagner de votre Epouse.*

I feel my late bereavement very severely, it is indeed a very trying dispensation but I trust the Almighty will enable me to bear it with fortitude.

My health is very delicate at this time indeed I feel myself very weak and I am ordered not to go out at all.

You will I am sure be glad to know that the Children are quite well they are rejoiced to hear of your wedding and desire their best love to you and Mrs. Vincent, *avec les respects de la bonne Margaret qui s'imagine que dan ses souhaits vous n'avez pas accompli ce qu'elle vous à demander du Wedding Cake pour elle, je pense qu'elle fera quelques songes à ce sujet*—your little friend Lowther is growing a very fine boy—

Fortune still smiles on Captⁿ Grant you will be glad to hear that he is connected with some of the highest people in England in the way of business.

I hope my young friend E. Vincent is well and that our separation will not make him forget me, as you are better acquainted with his mother than myself I trust you will prevail on her to allow him to pass a fortnight here as Brighton is a very healthy place and I think he would be happy with my children and his sincerest friend. With very best wishes for yourself and kind love to Mrs. Vincent I remain my dear Captⁿ Vincent

Yours very sincerely

Maria Grant

(Superscribed) *Cap^t Arthur Vincent,
Jerusalem Coffee House, Cornhill, London.*

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EXHIBIT, No. 2.

Brighton Decr 23rd 1837

Twelve o'Clock at Night

My dearest Arthur

Those only who have suffered them can tell the unhappy moments of separation—ô my Arthur let me speak in a language so well *entendu par vous et cela m'étant plus familier je veux vous exprimer les sentiments de mon cœur oppressé—Depuis que vous avez disparu devant mes yeux J'ai éprouvé la sensation la plus cruelle exactement je peux avec la simplicité de mon cœur vous dire que la comparaison is absolument comme ci vous aviez apparu à moi comme ce bel astre qui dans la nature donnent la vie aux plantes mourantes par son influence et qui dans l'absence voit flétrir et détruire ce qu'il-y-a de plus brillant—je pensent Arthur que nous étions former dans le ciel pour être unis si étroitement dans cette vie, car en verité par la simpathy et les sentimens sublimes que nous ressentons l'un pour l'autre combien la vie aurait passer délicieusement entre nous oui my beloved Arthur votre Maria est nertueuse et possédent un cœur qui vous aurait rendue heureux pour toujours—Jamais nous n'aurions vue un nuage s'approcher de nos têtes—toute ma joie aurait été de penser qu'à vous prouver de jour en jour combien la vie s'écoulent avec delices quand les cœurs et la delicatesse des sentiments sont unis aussi bien que deux creatures ensemble peuvent etre—a present je me considerent dans le silence de cette nuit seule comme the dove solitaire (dont notre amour est l'emblème dans la fidelité de nos cœurs embrasés d'un sentiment délicieux qui nous à fait éprouver ce que*

les couronnes des souverains ne peuvent posséder autant avec cette Idée votre fidelle Maria jusqu'à son tombeau ne cessera de vous chérir et respecter : prenez ô mon Arthur de ne pas négliger votre amie; more than that) soyez le Docteur qui doit me guérir avec prudence car ma vie est attachée à vous—you êtes tout pour moi dans ce monde ceci n'est pas seulement l'idée d'un amour exalté mais c'est très sérieux prenons nos précautions soyons prudent ensemble écrivez moi a la fin de cette semaine sous l'enveloppe et adressez à Margaret Jamieson, 5, Regency Square, c'est mieux parce que la bonne Margaret vous aime et comme elle reçoit beaucoup de lettres de ces amis de l'Ecosse cela ne donnera pas de soupçons prenez patience et avec prudence nous serons toujours en dépit des Jaloux bien favoriser—Je souhaiterai que je pourrai, a mon dernier Soupir recevoir ces flammes brûlantes que vous avez laissé dans mon sein—

Adieu my dearest Arthur—I sincerely hope to hear something soon from you—I am so wretched that I am sure God will have pity on your poor and devoted Fri (*torn off with the seal*)

Believe me

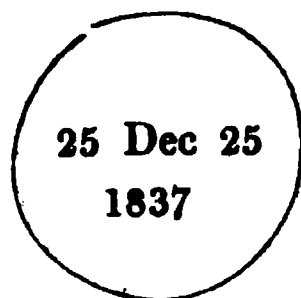
Yours ever most affectt^y

M. G.

Pray do kindly excuse my handwriting but I am so nervous that I cannot do anything well, it is a madness adieu

(Superscribed) *Cap^t Vincent,
Jerusalem Coffee House, Cornhill, London.*

(Post Mark)



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EXHIBIT, No. 3.

Brighton Dec^r. 29 1837

My dearest Arthur

Je ne pourrai pas passer ces jours solennels sans vous exprimer tous les souhaits de ce cœur si dévoué à vous, dans tout ce que l'amour a de plus exalté—Je ne puis songer, sans une extrême émotion à l'état où j'étais quand vous m'avez dit adieu this very day last week I may say—fix'd in her choice, and faithful but in vain, see me neglected on the world's rude coast, the dearest companion of my voyage lost!

O my Arthur, quand pourrai-je espérer de vous revoir si cela était possible dans votre journey seulement pour un demi jour, comme l'éclair brillant qui éclairent les pas incertains du voyageur.

Je rends grâces à cette divine Providence si infinie pour toutes les profusions de blessings upon my sweet family—Mon époux est très bon et attentive pour tout ce qu'un autre que moi devraient apprécier mais je ne suis pas digne mais je n'ai pas de pouvoir—vous seul saura me donner de la raison : mais à présent toute ma fragile nature est absorbée que dans vous seul.

Adieu—Believe me
Yours ever most affect^y
M. G.

Pray do excuse this in haste

(Superscribed) Captⁿ Arthur Vincent,
Jerusalem Coffee House, Cornhill.

(Post Mark)

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EXHIBIT, No. 4

Brighton New Years day

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My dearest Arthur

I begin this day in offering my heart to God to bless yourself and my blessed Family.

I am obliged to go to London to-morrow for a week, you will be sorry to hear that your Maria has received two days ago the most afflicting intelligence that has reached her—I pray God to comfort me and to enable me to sustain this heavy stroke with that resignation to His will which none but Himself can give.

I may say ò my Arthur with the Poet—Doom'd as I am, in solitude to waste the present moments and regret the past, depriv'd of every joy I valued most (my love torn from me) and I have lost my blessed Mother—*la semaine prochaine doit faire une impression bien melancolique sur mon cœur quand je reflechis dans l'amertume de ce cœur oppresser que votre infortunée et trop fidelle Maria sera dans les lugubres vêtemens d'un deuil sombre et n'ayant pas l'esperance d'entendre votre voix chéri pour la consoler ; ah, Arthur, think of your own devoted Maria.*

Je vous fait part de mes chagrins parce que je connais votre cœur preceieux

Je suis obligée de finir ma lettre car ma tête est tres confuse,

Je dois prendre garde à moi car je suis encore délicate.

Believe me

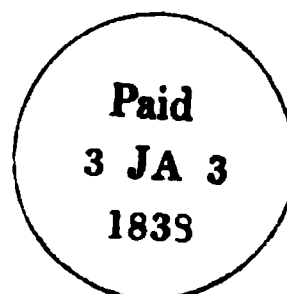
Yours ever most affecty

(Paid)

M. G.

(Superscribed Capt^r Arthur Vincent,
Jerusalem Coffee House, Cornhill, London.

(Post Marks)



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The libel went on to plead, that, the day following the discovery, Captain Grant communicated it to his friends, by whose advice, in the evening of that day, he proceeded to Brighton, accompanied by Mr. Macvicar, one of such friends, and Mr. Bolton, his solicitor, and, on the ensuing day, they all went to Captain Grant's house, when Captain Grant and Mr. Macvicar proceeded up-stairs into Mrs. Grant's bed-room, and other rooms, to search for any letters from Captain Vincent, whilst Mr. Bolton remained alone with Mrs. Grant, in the drawing-room, when Mr. Bolton, in answer to inquiries by Mrs. Grant, informed her of the detection of her correspondence with Captain Vincent, upon which Mrs. Grant, repeatedly, with much vehemence, denied that she had ever written more than one letter to him, and that, with her husband's consent, and that any other pretended letters were forgeries, or a conspiracy against her; that on Captain Grant and Mr. Macvicar joining them (when the former stated that he had first discovered that Captain Vincent had slept in his dressing-room, on the 21st of December) the letters No. 2, 3 and 4 were shown to Mrs. Grant, who exclaimed, "Oh, I thought all these letters had been received:" after which she no longer denied having written them, only declaring that she had never committed the crime with Captain Vincent. The remaining Articles of the libel pleaded that Captain Grant brought an action in the Court of Common Pleas, against Captain Vincent, for criminal conversation with his wife, in which judgment went by default, and the damages were assessed at 500*l*.

Upon this libel fifteen witnesses were examined.

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On behalf of Mrs. Grant, an allegation was admitted, which counter-pleaded the allegation respecting the behaviour of Captain Vincent and Mrs. Grant towards each other aboard ship, and pleaded that their whole conduct and demeanour towards each other was decorous and proper. It pleaded that Mrs. Grant, on the morning of the 21st of December, received a letter from her husband, informing her that Captain Vincent was to go to Brighton, and would call at his house, and directing her to invite him to dine, and to show him every attention and civility in her power—which letter was destroyed, in pursuance of a general injunction by Captain Grant; that when Captain Vincent came to the house, he came without any other previous knowledge of his visit by Mrs. Grant, who was then attended by her music-master, who remained at the house, and in the same room with Captain Vincent and Mrs. Grant, for a considerable time after Captain Vincent arrived at the house; that in pursuance of Captain Grant's injunctions, on many occasions, to show every respect and attention to Captain Vincent, she invited him to spend the day there, and engaged some friends to pass the evening at the house; that Mrs. Grant, with Captain Vincent, and her three eldest children, drove in a hired carriage about Brighton, and, on their return, Mrs. Grant went to her bed-room to dress for dinner, and did not go down-stairs till a few minutes before the dinner-hour; that, before Mrs. Grant, her son (twelve years old), and Captain Vincent had risen from the dinner-table, the friends who had been invited, arrived, and continued in

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the house till eleven o'clock, and that from their arrival, Mrs. Grant and Captain Vincent were never absent from the drawing-room during the evening; that Captain Vincent having mentioned that he was staying at the Albion Hotel, and that it was very expensive, Mrs. Grant informed him that she would endeavour to provide accommodation for him at the house, and consulting with Jamieson, it was arranged that a French bedstead should be hired, which was put up in the dressing-room of Captain Grant,—a back-room, adjoining the parlour on the ground-floor; that there was a spare bed-room ready for occupation, on the second floor, which Mrs. Grant would not allow Captain Vincent to occupy, as it adjoined her own bed-chamber; that she did not mention to her husband that Captain Vincent had slept there, in order (as he was very particular and rigid in looking over, and criticising, her accounts) that she might avoid complaint of the expense; but that the fact was well known to the servants and others; that, on the night of the 21st of December, Mrs. Grant retired to her bed-room, soon after eleven o'clock, attended by her maid, and her daughter, nearly seven years of age, slept with her, and that she did not leave her room during the night; that the sofa was frequently moved from one drawing-room to another, there being folding-doors between them, which usually remained open, and that it was so removed, on the 21st of December, to afford greater space in the front drawing-room for dancing, which the servants, and others well knew was to take place in the evening; and it denied that Captain Vincent sat on the sofa with his arm round Mrs. Grant's

waist, and pleaded that, during the visit of Captain Vincent, he and Mrs. Grant were never alone together, save for a short space of time in the morning of the 22d, just prior to his departure, during part of which time they were at breakfast, and, during the remainder, she was engaged with her music, the doors of the drawing-room being open, or unlocked, and it denied any act of adultery.

Upon this allegation eight witnesses were examined.

Addams and *Curteis*, for the husband. On the face of the letters the Court can come to no other conclusion than that, if the parties had an opportunity to commit adultery, they did commit it. As they were living on board the same ship during a long voyage, opportunities must have offered, and the witnesses state that there were familiarities between them which afforded matter for observation, to the mariners and others on board. There is proof of an arrangement for a clandestine correspondence between them, before they left the vessel, and there is no counterplea on this point on the part of the wife. The letters from Captain Vincent were not before the Court, but those from Mrs. Grant were, and they show that adultery had been committed, which creates a distinction between this case and that of *Hamerton v. Hamerton* (a). The evidence of Jamieson shows that Captain Vincent's visit on the 21st of December, was unexpected by Mrs. Grant; that she evinced surprise at seeing

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(a) 2 Hagg. Eccl. Rep. p. 8.

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him, which disproves her plea that she had been advertised of his visit by Captain Grant. The indecent familiarities between the parties on that occasion, the concealment from Captain Grant of the fact that Captain Vincent slept in the house; the denial of Mrs. Grant that she had written more than one letter to Captain Vincent, and her exclamation when they were produced, that "though her mind might be contaminated, her body was pure," and that "no one had seen her in his arms," the expressions in the letters, from a married woman to a young man, and the result of the action at law, were conclusive proofs of the guilt of the wife.

Phillimore and *Haggard* for the wife. There is no case where, in the absence of all proximate acts, and where the oral evidence failed, a wife has been convicted of adultery, on letters written subsequently to any act charged, and which, though they contain some remarkable expressions, do not allude to the commission of the crime; only one witness is produced, who deposes to a belief that adultery was committed on board the ship, and several persons depose to the contrary. The only passenger saw nothing but polite and respectful conduct on the part of Captain Vincent towards Mrs. Grant. Captain Grant was an austere man, (according to the evidence), and his wife, being a lively woman (a French creole of Mauritius), was desirous of cultivating an acquaintance with Captain Vincent, which accounts for his employing the intervention of the servant. There is not a single letter of Captain Vincent, and in *Hamerton v. Ha-*

merton, the letters *per se*, were held to be no evidence of guilt. As to the action at law, Lord Stowell, in *Elwes v. Elwes* (a), said, "How can that be evidence against the party which has passed in a suit to which she was not privy?" And in *Williams v. Williams*, (b) where a verdict went by default, Lord Stowell pronounced against the divorce.

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JUDGMENT.

SIR H. JENNER,

THE facts of this case lie within a narrow compass. The parties, in 1835 or 1836, went from this country to the East Indies, on board the *Lord Lowther*, the property of Captain Grant, and at that time under his command, accompanied by two of their children, (they having five children at this time,) three of their children being left at Brighton. They proceeded to several places, and, on the 8th day of May, 1837, being then in China, left that country on board the same vessel, on their return to England, and landed at Brighton about the 10th or 11th day of November, and remained for a few days at the Norfolk Hotel, and then took up their residence at No. 5, Regency Square, where they continued to reside till the separation on the 10th or 11th day of February. On the homeward voyage Captain Grant did not continue in command of the vessel, but had appointed to its command a gentleman of the name of Vincent—Captain Grant and his family being in the situation of passengers on board the vessel; and Captain Grant appears to

(a) 1 Consist. 290. n.

(b) 1 Consist. 306.

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have been also owner of a moiety of the cargo on board. It is with Captain Vincent during this voyage, and also during two days in December, 1837, after the vessel had arrived, that the adultery is alleged to have taken place; and it is clear that, if adultery did take place at all, it must have been on board the vessel, during the voyage, or during the 20th and 21st days of December, or one of those days; for the parties scarcely seem to have had any acquaintance with each other till they were on board the same vessel: and, after the vessel had arrived at Brighton, and Captain Grant and his family had left her, it is clear that there was no other interview between Captain Vincent and Mrs. Grant, than on the 20th and 21st of December: On board the vessel, besides Captain Grant and his family, there was another passenger, Mr. Anderson, and also a Mr. Cockerell, who came on board as a passenger, but who subsequently acted as purser of the vessel. The situation of the rooms and cabins occupied by Captain Grant and his family, consisting of sleeping-cabins for the children and themselves, and a sitting-cabin for the use of Captain and Mrs. Grant, appears to have been in the after-part of the vessel, and nearer to the stern than the cuddy-room, which was common to all the passengers, and to the officers of the ship; but no person who had not occasion to go to the cabins, occupied by Captain and Mrs. Grant, had any right of access there whatever; so that, to a certain extent, they were cut off from communication with the other persons on board the vessel, except those who were immediately connected with the family of Captain and Mrs. Grant.

It seems to be the general result of the evidence, that Captain Vincent, a short time after their embarkation, and particularly, (as one of the witnesses states) after they left Saint Helena, paid attentions to Mrs. Grant, of such a nature as to attract the notice and excite the observation of persons who saw those attentions; not, as it appeared to Mr. Cockerell and Mr. Anderson, that there was anything improper in them, or that they were paid with any improper motive or object; but still there were particular attentions paid by Captain Vincent to Mrs. Grant, beyond what were necessary on his part, as the captain of the ship, and which seem rather to have been encouraged by her. They were in the habit of walking together on deck in the absence of Captain Grant, and were observed sitting together when Captain Grant was walking on the deck, as he was accustomed to do for some time together, and when he was asleep in the cabin, which he was in the habit of doing every day after dinner. It is very true that no impropriety is considered to attach to the conduct of these persons on board the vessel, in the opinion of Mr. Cockerell and Mr. Anderson; but still, as I have stated, it did attract their observation and attention.

It may be proper for the Court to refer to some parts of the evidence of these witnesses, and of another person on board the vessel—Jamieson, the nursery-maid—for the purpose of pointing out that, although she was a personal attendant of Mrs. Grant's children, and probably of herself too, (though there was another female servant,) she saw nothing in the conduct of Mrs. Grant and Captain Vincent which created a suspicion in her mind of

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anything improper between them ; and also, that she did not observe any indecent familiarity in the manner in which they conducted themselves towards each other on board the vessel. All this is material in coming to a conclusion as to the charge against Mrs. Grant.

Jamieson says, "I saw nothing particular in the attention of Captain Vincent to Mrs. Grant, in the voyage home ; at first they seemed as strangers ; by degrees they seemed to become better acquainted ; but there was nothing that I observed in the attentions which he paid, more than a gentleman would pay to a lady. I did not observe that she encouraged his attentions ; nor that she and Captain Vincent appeared to be on a very intimate or familiar footing with each other. I could not say that they were much or frequently alone together ; I never saw them alone, but in places which were open to other persons ; in the cuddy I have seen them alone, he sitting on one side of the table, and she on the other. I never saw them together in her dressing-cabin. I have seen them in a sitting-cabin, but it was not Mrs. Grant's, for she had not one ; it was a sitting-cabin open to other persons ; and when I saw them in it the door was open." I do not quite understand the evidence of this witness here, when she says it was a sitting-cabin open to other persons. As far as I can collect from the other evidence, the rooms they occupied were situated in the after-part of the vessel, through the cuddy, and it was necessary to go through the cuddy to get to the sitting-room, and that this room situated in the after-part of the vessel) was specially appropriated to Captain Grant and his family, and

no other person had a right to go there unless he had business with him. "I cannot say, when they were alone together, whether it was or was not unknown to Captain Grant; he might have known it, as I did know it; any person might have seen them. I did not observe that it was particularly whilst Captain Grant was walking the deck, or sleeping after dinner, that Captain Vincent and Mrs. Grant were alone. Captain Grant was in the daily habit of walking the deck for an hour and more at a time, and he every day after dinner used to retire into his cabin to sleep. I could not say that I ever observed Captain Vincent and Mrs. Grant in particularly earnest conversation; nor that they were sitting close to each other. I never observed in them any appearance of embarrassment or confusion. I never saw Captain Vincent take any personal liberty with her. I never observed in the conduct or demeanour of either of them anything to attract notice. I never heard their conduct made the subject of conversation or remark but once, when one of the young midshipmen, Mr. Steward, said to me, 'Margaret, I wonder what those two gets to talk about.' I had no idea that in that he meant to say that there was any impropriety in their conduct, and I never saw any." Now certainly, as far as her evidence goes, she entirely negatives having seen anything particular in the attentions paid to Mrs. Grant by Captain Vincent, or anything particular in their conduct to each other, or that any other person in the ship made mention of anything passing between them; and, therefore, it does not support, but rather negatives, the allegation as to any particular at-

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tentions being paid by Captain Vincent to Mrs. Grant, and as to their being encouraged by her.

Another witness who has been examined on the same Article of the libel, Mr. Cockerell, who, by the tenour of the interrogatory put to him on behalf of Mrs. Grant, it was supposed was likely to have spoken as much as he could to her disadvantage, but it seems to me that Mr. Cockerell has given his evidence with great candour and fairness. He states that he has known Captain Grant for many years, and Mrs. Grant only from the time of her coming on board the ship, on the 8th day of May, when the *Lord Lowther* left Macao Roads for England, and he thus deposes, "I should say that, at first, there appeared to be but a slight acquaintance between Captain Vincent and Captain Grant and his wife. I thought that, soon after the commencement of the voyage, Captain Vincent paid more particular attention to Mrs. Grant than was necessary as the captain of the ship; and I should say, that she seemed to encourage and be pleased with his attentions. It did not appear to me that there was any improper object in his attentions: they were particular; and knowing, as was commonly known on board, that Captain Vincent was an engaged man, and, looking to Mrs. Grant's position in the vessel, I considered Captain Vincent's attention to her such as one would pay to a superior, and that he was making his court to Captain Grant through his wife, with a view to his future interest. I put no other construction on his or Mrs. Grant's conduct. So far as I have said, they became on an intimate and familiar footing." It does appear, then, that he observed particular at-

tentions paid to Mrs. Grant by Captain Vincent, more than was required from the captain of the ship, though he saw no improper object in them ; and, considering the position of Captain and Mrs. Grant, having their children and servants on board the vessel, there was everything to lull suspicion ; he could not suppose that anything improper could be intended, although the attentions of Captain Vincent were beyond those usually paid by the captain of a vessel to the female passengers on board. “ They were a good deal together in the evenings, but I cannot say that they sought occasions for being alone ; they were rather thrown together ; and I cannot say that it was unknown to Captain Grant. He was in the habit of going to sleep after dinner, and at that time Captain Vincent was more at leisure from the duties of the ship. There did not appear to me to be any design in their being alone together. It was in Mrs. Grant’s sitting-cabin that I saw them mostly alone together, and whilst Captain Grant was in his sleeping-cabin, after dinner.” So that Mr. Cockerell says they were sitting alone together in Mrs. Grant’s sitting-cabin ; whereas Jamieson says, it was an open room, and that there was no sitting-cabin belonging to Mrs. Grant. “ I have seen them sitting on the sofa together. Captain Grant walked the deck daily for hours together. Being not only owner of the ship, but of about half the cargo, he naturally took a great deal of interest in the progress of the vessel, and was a great deal on deck.” He states, “ There was only one occasion on which I observed anything so particular in the situation of Captain Vincent and Mrs. Grant as to raise a

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suspicion in my mind, but that I did not think of afterwards. It was one evening after the cuddy was lighted up. I went into it rather suddenly, and they were sitting at the further end of the table close together, and they certainly seemed surprised at my entrance, and embarrassed and confused." Now, what was the exact situation of the parties on this occasion, we are not precisely informed, only that "they were sitting quite close to each other at the corner of the table." There was nothing in the situation of the parties which admits of a conclusion that any indecent familiarities were taking place at this time; but there was something in their conduct which made them appear embarrassed and confused. "I never saw Captain Vincent kissing Mrs. Grant, nor taking the slightest personal liberty with her. I had no idea of anything of the kind. I never heard their conduct made the subject of conversation or remark; nor was it likely I should hear it, for Captain Grant was my principal associate on board, and I was a good deal with him, and, not having much intercourse with the other persons on board, they, seeing my intimacy with Captain Grant, were not likely to make his wife's conduct the subject of conversation or remark to me. I had not any reason to believe that there was any improper intercourse between Captain Vincent and Mrs. Grant; I did not observe any thing to lead me to suspect it." So that the evidence of this gentleman goes to this: that he saw Captain Vincent and Mrs. Grant, on some occasions, sitting close together, when Captain Grant was on deck or in his sleeping-cabin, to which he returned

after dinner; and though on one occasion what he saw may have created some suspicion in his mind, there is nothing from which the Court can infer that adultery had been committed between the parties, as far as what was seen by Mr. Cockerell. There is nothing as to what is pleaded in the libel, of Captain Vincent taking indecent liberties with Mrs. Grant.

Three other persons have been examined from on board the vessel. Wilkins, one of them, who was cooper on board the vessel during her voyage between China and this country, says that Mrs. Grant and Captain Vincent were not well acquainted before the vessel left Macao. He says, "soon after the voyage commenced, Captain Vincent was very attentive to Mrs. Grant, and she seemed very affable with him. It was not very long before they got on very intimate and familiar terms; I observed that not long after we left Batavia; the manner in which she took hold of his arm on deck, and being so very close to him, made me think that there was something;—that was my opinion. Until I became captain's steward, I could only see them on deck; and I noticed their being so much together, and that there was that in her manner towards him from which any person could see that she had a leaning that way, and particularly as it was so different when Captain Grant was on deck." That is a circumstance, undoubtedly, which is calculated to awaken the attention of the Court—the difference in the conduct of Captain Vincent and Mrs. Grant to each other, when the husband was present and when he was absent. It has been said that the witness, Wilkins, is a person on whom no reliance

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can be placed—that he has deposed untruly. I think not; for although this difference in the conduct of the parties may not have been observed by Mr. Cockerell, or by Jamieson, the fact may have occurred to the observation of a person who was on deck; and he is confirmed by the evidence of other witnesses. “After I became captain’s steward, I saw them together alone in the cuddy, and also in the inner cabin; and I saw him going into the nursery, where I heard Mrs. Grant’s voice, talking or singing. It was not every day I saw them alone, but I saw them frequently alone, and it was at that time when Captain Grant took his morning walk on the poop. I am quite certain it was unknown to Captain Grant, and I was afraid to discover it to him, for I stood like between two fires; and therefore I did not like to see more than I could help—though I did sometimes make an errand into the cuddy to wipe or dust, just to see what was going on. I never saw them in a dressing-cabin. Captain Grant used mostly to retire to sleep after his dinner; and then, also, I noticed that Captain Vincent and Mrs. Grant were alone: they used to sit quite close together, sometimes playing at a game, I think, they called chess. I cannot say that they seemed confused or embarrassed when I entered the cabin and found them together, but on seeing me, they would shift their positions a little, or ask for something, as an excuse. I cannot say that I ever saw Captain Vincent kissing her, but I have seen his face two or three times, or more than that, so close to her bonnet that I had no doubt about it. I have also seen his hand upon her thigh twice or thrice, or more; this was in the sitting-

cabin." Now, if this witness is to be believed, he proves an act of gross familiarity occurring within his own observation ; and I see no reason to distrust his evidence because this was not seen by other persons. " They must have seen me, but not, perhaps, that I observed what they were about. Their whole conduct was the talk of the ship's company. I did not mention what I saw to any one ; but the free manner in which Mrs. Grant behaved, and her bearing towards Captain Vincent, was quite the subject of jokes, and of the coarsest jokes, of the ship's company ; and they could only see what passed on deck ; they could not see what passed in the sitting-cabin ; and what I saw there, could not have been without taking some little pains, going round the cuddy and looking into the cabin. Any person coming up the cuddy to the cabin would have been heard. On these occasions Captain Grant was on deck. I do really believe that, on some of the occasions on which I saw Captain Vincent and Mrs. Grant alone in the sitting-cabin, they committed adultery." He says, " I could not be deceived as to where his hand was—on the inside of her thigh ; it was as clear as possible. And they could always tell where Captain Grant was, by his tread above on the deck ; and there was no other person who would have any right to enter the cabin : the children, if they had come down, would have gone into the nursery ; and if they had not, they made such a frisking and noise, that there was plenty of time to separate." The evidence of this witness, then, goes to prove that certain familiarities passed between these parties, which, though they may not lead to the conclusion

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of adultery having been committed between them, show that there was something more in the attentions paid by Captain Vincent to Mrs. Grant than was supposed by Mr. Cockerell, who considered them as nothing more than a paying court to Captain Grant through Mrs. Grant.

Smith, another witness, who was a midshipman on board the vessel, states that he observed that Captain Vincent paid particular attention to Mrs. Grant during the voyage, and he thought that Mrs. Grant encouraged his attention, and seemed pleased with it. "They got, not long after the commencement of the voyage home, on very intimate and familiar terms; they used to be whispering and smiling together on deck, when Captain Grant was asleep below in the evening, about dusk. From six to eight o'clock in the evening Captain Grant used to be in his sleeping-cabin, and then Mrs. Grant and Captain Vincent used to be on deck, whispering and smiling together; and she used to be sitting on deck sometimes by his cabin-window, which looked upon the quarter-deck, whilst he talked to her through the window. They were always talking in that way, as if they did not wish to be overheard. I never saw them alone together in the cuddy; they used to sit together there, but then any person almost might go into the cuddy. I never saw him in her sitting or sleeping-cabin, or dressing-cabin; I never noticed that they cared about being seen or observed when they were together; I never saw Captain Vincent kissing or taking any personal liberty with Mrs. Grant; I never saw anything particular in their conduct or demeanour, except this low whispering

and talking in the evening, when Captain Grant was below in his cabin ; and they behaved so differently towards each other when he was about." Here, again, is a difference of manner spoken to in these persons when it was likely to fall under the observation of Captain Grant, the husband. He says, " Their conduct was very much talked of on board the vessel ; the men at their work used to make their remarks about it, and we, in our berth, used to talk about it, more in joke than anything else, for we did not think that there was anything in it at the time, though we did talk about it, and think it very odd that Mrs. Grant, as a married woman, should be so very particular with Captain Vincent. I never saw anything to give me reason to believe that they were criminal together ; I did not think that, though their conduct was so odd." So that here is another witness, who says that the conduct of these persons on board the vessel was such as to attract the observation of the ship's company ; that the ship's company used to make remarks upon it, and the midshipmen in their berth used to joke upon the subject ; though this witness, at the same time, under all the circumstances under which they were on board the vessel, did not conceive that there was any actual criminality between them.

The witness Pyle speaks much to the same effect, as to the general conduct of these persons towards each other. He describes himself as being a carpenter and joiner ; he says, " Soon after the commencement of the voyage, I thought that Captain Vincent was paying great attention to Mrs. Grant. They used to be walking the deck in the evening,

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and laughing and talking together ; and she used to be sitting at his cabin-window, talking to him. It was very particular, and became the talk of all hands upon the gun-deck, who were continually jeering about it. It was more particularly so after we left St. Helena. Any person might have heard the men jeering about the intimacy between Captain Vincent and Mrs. Grant. It was common for my messmates to say to me, when I had been in the cabins for any job, ‘How is your mistress by this time?’ alluding to her being with Captain Vincent—for they were together every evening almost; either walking the deck, or at his cabin-window, or under the poop-awning. And it was in the evening that Captain Grant was either asleep in his cabin or reading there, at the time when his wife and Captain Vincent were together, as I have said. I have also seen them together in the sitting-cabin alone; on one occasion, she was reclining on the sofa, and he was sitting on it. I went in to fetch a guitar to clean; it was in the evening; and I saw Captain Grant on his sofa, in his sleeping-cabin, asleep. I have, on other occasions, seen Captain Vincent and Mrs. Grant sitting alone together in the sitting-cabin; on one occasion, I saw Captain Vincent go across the cuddy from his own cabin to Mrs. Grant’s sitting-cabin; it was in the morning, and Captain Grant was walking the deck at the time. I saw Mrs. Grant standing at the folding-doors, between her sleeping and sitting-cabin, and she spoke to Captain Vincent, in answer to his inquiry, how she was that morning. I left the cuddy at the time, and don’t know what took place afterwards. Captain Grant took his regular walks

on deck, and walked a good deal at times. My chief work on board the vessel was in the cuddy and cabins, and that was how I came to see Captain Vincent and Mrs. Grant there ; but, some how or other, it happened, and it seemed strange to me, that after Captain Vincent had the command, I was not near so much wanted in the cabins as I had been before, and I only went there when he ordered me. I can't say whether they tried to be alone unknown to Captain Grant, but they were very different to each other when he was present." So we have the opinion of three witnesses, to the same effect, that the behaviour of these persons to each other was such as to excite the observation of the persons on board : that the ship's company jeered ; and that there was a considerable difference in their behaviour when Captain Grant was likely to observe it. He says : " And that was commonly said on board ; for when, in the evening, Captain Grant was below in his cabin asleep, or reading there, they were on deck together, close in conversation, or she sitting under his window." He says that, " Although I thought and saw that they were very intimate, and that her conduct was not what it should have been as a married woman, I never saw any kissing, or personal liberty between them ; and I did not form any belief myself whether they had or had not committed adultery together. I did not see enough to feel that I could say that I believed that they had or had not so. I saw them alone on deck, and in the cabins, and thought their conduct very strange ; and the men used to talk freely, and say what they thought ; but I did not say anything myself, for I was chaffed so much by

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the men, about what I saw in the cabin, and how Mrs. Grant and Captain Vincent were getting on, that I held my tongue.”

The evidence of these three persons, then, clearly shows that some intimacy subsisted between these parties, whether improper or proper. When I say improper intimacy, there can be no doubt, if these witnesses speak truly, that the intimacy was of a nature totally inconsistent with propriety, considering the situation of Mrs. Grant on board this vessel, being with her husband and children, and servants. It does not, certainly, go to the extent of proving the commission of the crime of adultery between them; yet there can be no doubt that an intimacy of very considerable strength had grown up between them from their courting each other's society so much during the voyage, and from other circumstances; their seeking so many opportunities of being alone together, during the time that Captain Grant was asleep or on deck: all which was not consistent with propriety in a married woman.

But there have been some witnesses examined on the Allegation given in on behalf of Mrs. Grant, to the benefit of whose testimony she is entitled; and one of those witnesses is Mr. Samuel Anderson, who was a passenger on board the vessel. He says, he never observed that Captain Vincent paid any attention of a particular nature to Mrs. Grant. “I observed nothing more than civility and politeness on his part towards her. He was particularly attentive to her, but no more than appeared to me proper. She seemed pleased with the civility of his attentions. I did not observe that they sought occasions of being alone together. I saw them

occasionally, sitting together on the deck in conversation; they appeared in confidential conversation, not to say in earnest conversation. I never witnessed any occasion on which they exhibited any embarrassment or confusion. I never saw any personal liberty pass between them. I had no reason to believe, from anything which I witnessed, that they had committed adultery together. As far as I saw, their conduct and demeanour throughout the voyage was decorous and proper." Mrs. Grant is entitled to the benefit of this gentleman's testimony.

Now, if the case on behalf of Captain Grant had terminated with the voyage—with the landing of his family at Brighton—although there are circumstances spoken to, which appear to be entitled to considerable weight, I do not think any of those circumstances, if they stood alone, sufficient to justify the Court in coming to a conclusion, on this evidence, that adultery was committed on board the vessel between these parties.

But, unfortunately, it does not terminate there; because, soon after the arrival of these persons at Brighton, an arrangement was made between them, that some correspondence should take place between them, the letters to Mrs. Grant being addressed, under cover, to Margaret Jamieson, who speaks to this fact. She says, that a day or two before their arrival, Mrs. Grant said to Captain Vincent, in her presence, that she should like to hear from him, to know how he found his intended bride, on his arrival in England; and she told the witness that Captain Grant did not like Captain Vincent; and that, therefore, the letters from Captain Vincent, to Mrs. Grant, would be addressed

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under cover to her; and it appears that one letter was so addressed, from Captain Vincent to Mrs. Grant; for Margaret Jamieson deposes that, whilst they were at the Norfolk Hotel, a letter came, addressed to her, and that she was disappointed on opening it, to find that it was not from her own relations, but for Mrs. Grant, who afterwards told her that it was from Captain Vincent. This is a circumstance which the Court cannot look at without a considerable degree of jealousy and suspicion—that she, a married woman, should wish to hear from Captain Vincent, a person with whom during the voyage she had been so often alone, sitting on the deck in confidential, if not in earnest conversation together—walking about the deck, and sitting in the cabin in the absence of Captain Grant—their conduct being different when Captain Grant was present, from what it was at other times—all these circumstances do create in the mind of the Court, a suspicion that it was not so much with a view of hearing of the bride of Captain Vincent, as for some other object, that Mrs. Grant was so anxious to hear from him on his arrival in England. It was of no importance to her, whatever, how he found his bride; and if it was, it could not be necessary to resort to this contrivance, of the letters from Captain Vincent being addressed to herself, under cover to Jamieson.

But though it certainly appears that one letter passed, there is no evidence of any other letter; and it does not appear from the evidence, that Mrs. Grant wrote to Captain Vincent in return: it may or it may not be the case. It was not communicated to Jamieson, and it was not necessary to do

so: it was not necessary that the letters sent to Captain Vincent should be communicated to Jamieson, for there were plenty of opportunities of conveying a letter to the Post Office by Mrs. Grant herself, without the intervention of another person, so as to make this an unnecessary part of the machinery.

But Captain and Mrs. Grant leave the Norfolk Hotel, and proceed to Regency Square, Captain Vincent going round with the vessel (I presume) to London; and nothing more is heard of Captain Vincent till the 20th day of December, when he appears at No. 5, Regency Square, and inquires for Captain Grant; and, finding that he was not at home, he inquires for Mrs. Grant, and is shown up stairs into the drawing-room, and he continues there during that day, and till twelve o'clock on the following day. There is nothing to show that Mrs. Grant informed Captain Vincent of the absence of Captain Grant; and therefore it must be considered to have been a visit paid to Captain Grant, without any knowledge on the part of Captain Vincent, that Captain Grant was absent from Brighton. Being informed that he was absent, he inquires for Mrs. Grant. There are no means of ascertaining for what purpose the visit was paid; be the occasion what it was, Captain Vincent seems to have arrived at Brighton on the night preceding, and to have slept at the Albion Hotel, and he appeared in Regency Square, between ten and eleven o'clock in the day, according to one witness, and rather later, according to another. The parties were for some time alone together in one of the drawing-rooms which communicated with each other by

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folding-doors; and there they remained, for some period of time at least, alone together: for, supposing Captain Vincent to have arrived between eleven and twelve o'clock, it should seem that, at that time, or shortly after, (at twelve o'clock) the children went out to walk, and Margaret Jamieson and Miss Robinson also went out with them on this occasion, and therefore none but the servants were at home. What passed between these persons on that occasion, or what length of time they were together, the Court has no means of knowing. But about twelve o'clock, (unfortunately there is a little doubt as to the time—the stated time was about one o'clock,) Mr. Croft, who was in the habit of giving lessons in music and singing to Mrs. Grant and her daughter, arrived. He says, he believes he was there from about one to two o'clock; but he gives no particular account of what he observed at the house; he has no precise recollection on the subject; he has some impression of having seen Captain Vincent on that day, and the Court cannot be certain that during the early part of that day Mr. Croft had been at the house. Between three and four o'clock the children went out for a drive in Brighton. There were two flies, and Captain Vincent, Mrs. Grant, and some of the children, went in one fly, and Jamieson and the other children in the other; and they were driving about till near five o'clock in the afternoon, when it was almost dark. When they returned home, and the children (I presume) were away, Captain Vincent and Mrs. Grant were observed, soon after their return home, in the back drawing-room, between five and six o'clock, sitting on the sofa together,

Captain Vincent's arm being round her waist. Now, this is said to be a trifling circumstance, considering the relation of each of these persons to the other; but that persons who had so conducted themselves on board the vessel during their voyage from China to this country, should be found on an evening, in the month of December, in the dusk of the evening, sitting without fire or light, on a sofa, the arm of Captain Vincent being round the lady's waist, I cannot think is a circumstance so very unimportant; and if persons will so conduct themselves, in such situations, they cannot expect that conclusions will not be formed as to their conduct when they are not so immediately under observation, as where persons might have access to the places where they are together. I cannot but think that it is a circumstance which must be taken into consideration by the Court, in looking at the probable course of conduct of these parties towards each other, on this, and the following day.

But the case does not rest here; for on the same day, (Captain Grant being absent from Brighton,) Captain Vincent is to sleep in the house, and some machinery is set in motion for the purpose of his continuing in the house during the whole of the night; and I cannot think it a trivial circumstance, the finding these persons in the room together, his arm being round her waist, though there is no proof of anything else being observed, when all this machinery is to be contrived to keep Captain Vincent in the house.

About the time of going out in the fly (about three o'clock in the afternoon), it was proposed by Mrs. Grant, that Captain Vincent should sleep in

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the house. It is suggested in the Interrogatory, that Jamieson had proposed that he should sleep in a room adjoining Mrs. Grant's bed-room, on the second floor, where the eldest son, a youth twelve years of age, was in the habit of sleeping, and which was ready for use at the time; but that Mrs. Grant declined acceding to the proposal, and said that it would be improper, Captain Vincent being an unmarried man, that he should sleep in a room adjoining her own, and proposed that a bed should be hired and put up in Captain Grant's dressing-room, on the ground-floor; and, accordingly, a bed was hired from Mr. Stead, to whom the house belonged, for the occasion, and put up; and in that bed Captain Vincent was to sleep. The circumstance itself, of Captain Vincent's sleeping in the house, cannot but, under the circumstances of the case, strike the mind of the Court as something extraordinary, even on the supposition urged by the advocate of Mrs. Grant, in the endeavour to get rid of this circumstance, that it is the custom in the country of which Mrs. Grant is a native, (the Mauritius,) that gentlemen, coming to visit, should sleep in the house—and it may very possibly be so; and, if nothing occurred before or after, calculated to excite suspicion, it might be a sufficient explanation. But the Court must not be confined to any particular time or place, but must take the whole of the circumstances into its consideration, as well before as after. Supposing it had been the custom in the country where Mrs. Grant has been in the habit of living, is it the custom of that country to hire a bed, or to conceal the fact from the husband who may happen to be absent?—to repre-

sent to him, on his return, if a gentleman visited the house under the circumstances that Captain Vincent did, that he did not sleep there? Is it the custom to conceal the fact of a bed being hired for that person's accommodation?—or is it the custom also, that the charge should not be made in the bill, but paid by the wife? Surely, all these circumstances are sufficient in themselves to excite the suspicion, and to arouse the jealousy of the Court, as to the conduct of the parties; and the Court cannot but think that, in conjunction with the circumstances which took place on board the vessel, they afford strong grounds for believing that an improper intimacy subsisted between them. It has been suggested, that Captain Vincent could not afford the expense of a bed at the Albion Hotel for a second night; and so, out of compassion for his impoverished circumstances, Mrs. Grant proposed that he should sleep in the house, and hired the bed; and that it was on that account not paid for by her husband, but by her without his knowledge. I cannot think that the setting up this defence does much for Mrs. Grant, or that it affords a justification of her concealing the fact from her husband. And I must look to the situation of the parties, to what had occurred before, to what occurred that day, and to the concealment afterwards: I must look to all the circumstances which occurred, and to the whole of the facts at the time this visit was paid.

In the afternoon of this day, Captain Vincent dined with Mrs. Grant, and her eldest son was present. They dined about six o'clock, and, about eight o'clock, Mrs. Grant had a small party, at

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which were present Mr. Croft, his wife, and Miss Robinson. They amused themselves with music and singing, from eight o'clock till eleven, and the children exhibited their proficiency in dancing the Gallopade and Mazourka. During this time, between eight o'clock and eleven, it does not seem that there could have been any improprieties passing between Captain Vincent and Mrs. Grant, for Mr. Croft and his wife have deposed that, during that time, Captain Vincent and Mrs. Grant were never absent at the same time, so as to afford the opportunity of committing adultery together. About eleven, or between ten and eleven, the persons at the party took their leave, and Mrs. Grant and Captain Vincent retired to their respective rooms shortly after, Mrs. Grant having in her bed-room one of the children (about six years of age) to sleep with her: this is proved by Jamieson, who states that she put the child into her bed, and took the child away on the following morning, when Mrs. Grant was in bed; and one of the maid-servants, who took up coffee to her on that morning, states that she was then in bed with her child; and there is no evidence to show that Captain Vincent left his room after he retired to bed; and it appears that he got up about seven o'clock on the next morning: the man-servant states, that he took up coffee to him in his bed-room at that hour. Mrs. Grant slept one story above Captain Vincent; the four maid-servants slept in the attics, and Jamieson, with the children, slept in the nursery, which was immediately over Mrs. Grant's room, and the two men-servants slept in a room down stairs, under the dining-parlour. During the night it does not

appear that any person heard Mrs. Grant go from her room, or Captain Vincent go from his, to any part of the house ; and the circumstances, suspicious as they are, would not be sufficient alone to justify a conclusion that adultery took place between the parties ; and, therefore, suspicious as the conduct of the parties may have been, the Court could not, unless it was actually certain that an act of adultery had taken place, pronounce the sentence of separation which the husband seeks at its hands. It has been said that the evidence of the maid-servant, a personal attendant of Mrs. Grant, shows that it is not probable that an act of adultery could have taken place between the parties after their return from the drive in the fly, for that she dressed Mrs. Grant. I cannot say that, from the evidence of this witness, any such necessary inference arises ; for she says, she was but a very short time with Mrs. Grant on that occasion ; and, therefore, between the time of returning from the drive and the time of dressing for dinner, there is no reason why these persons should not have been alone together in the drawing-room for a considerable time, when they were seen sitting on the sofa, Captain Vincent's arm being round her waist, and that an act of adultery might not have been committed. It is true, there is no evidence to show that the door of the drawing-room was locked, or that there was anything to prevent a person from entering the room who thought proper to do so ; but still, whether this was the case or not, the parties were alone together for a considerable period of time, and were observed on the sofa in the situation I have stated : the sofa stood usually in the front drawing-room, but it had been removed into

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the back drawing-room, for the purpose of affording more room for the exhibition of the children at the party on the evening of the 20th of December.

On the morning of the 21st, Captain Vincent breakfasted with Mrs. Grant. The children were all down stairs in the parlour, where they received their lessons. Captain Vincent left the house about twelve o'clock in the day, the children being brought to take leave of him; and it is suggested that there could have been no improprieties between the parties on this occasion: but Captain Vincent had been alone with Mrs. Grant during a considerable time in the morning, and during breakfast in the back drawing-room; for the governess states that she came to instruct the children for the first time on that day, and that they were occupied from ten till twelve o'clock; so that the parties were together some time during the morning of the 21st. But no person saw them in a situation from which the Court could infer that adultery had been committed. On that day, Captain Vincent left, and went to London about one o'clock; and here the parol testimony ends. No personal intercourse took place between Mrs. Grant and Captain Vincent, from that time till the separation between her and her husband.

Now, as far as the parol evidence goes, there is quite sufficient to satisfy the mind of the Court, that there was an intimacy and attachment between Mrs. Grant and Captain Vincent entirely inconsistent with the duty which a virtuous married woman owes to herself and her husband. On one occasion, Captain Vincent sitting on the sofa, and she reclining; on another occasion, some liberties

were observed to be taken by Captain Vincent with the person of Mrs. Grant, which would not be tolerated by a virtuous married woman, from a person in the situation in which Captain Vincent was on board the vessel. I cannot but think that the circumstances are such as must raise jealousy and suspicion in the mind of every person; and the Court must look at them in conjunction with other circumstances which have been deposed to; for the Court is to look to all, and not to one or two isolated circumstances.

The principle applicable to cases of this description, where there is no direct and positive evidence of an act of adultery, at any particular time or place, is laid down in a variety of cases, to which it is not necessary for the Court to advert. It is not necessary to prove an act of adultery at any one particular time or place; but the Court must look at all the circumstances together, and form its own opinion whether they lead to a fair and natural conclusion that an act of adultery has taken place between the parties at some time or other. Whether the circumstances already deposed to are sufficient to lead to such a conclusion, in this case it is not necessary for the Court to say, because there are other circumstances which do appear to me to leave no doubt that an act of adultery has been committed between the parties, though it is difficult to come to a certain conclusion as to the particular period of time. I allude to the letters which have been produced in the Cause, and which, unfortunately for Mrs. Grant, came into the possession of Captain Grant.

Captain Vincent was engaged to be married, on

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his return to England ; and it should seem, that the letters addressed to Captain Vincent by Mrs. Grant (the first being dated the 23rd day of December, the last the 18th day of January) had not been called for by Captain Vincent, but had been left in the box in the Coffee-house till they were found and taken possession of by Captain Grant. On the 10th or 11th of February, he goes to his house in Regency Square, and accuses his wife of adultery with Captain Vincent, and then, taking a key which hung on her neck, he proceeds to search amongst her boxes for any letters which might have been addressed to her by Captain Vincent ; but he found none whatever. During the interval of the search, Mr. Bolton remained in the room, in company with Mrs. Grant ; and he describes what took place during that interview with Mrs. Grant. He says : “ Captain Grant came to consult my partner and myself, on the subject of certain letters which he had discovered, purporting to be written by his wife to a Captain Vincent. The result of his consultation with me was, that he should proceed with me and Mr. Macvicar to Brighton. I went with Mr. Macvicar and him to Brighton on that same night. On the following morning I went with him and Mr. Macvicar to his house. On our arrival at the house, I went with them into the drawing-room, where Mrs. Grant was. There was a music-master, as we were told, in the room when we arrived ; the servant was told to desire him to leave, and the child he was teaching, and then we went into the drawing-room and saw Mrs. Grant. Captain Grant, in some excitement, took from Mrs. Grant a key which was attached to a riband

round her neck, and then left the room with Mr. Macvicar, saying, 'All has been discovered!' I was left alone with her for a long time, in the course of which she asked me what it meant—her words were, 'What does all this mean?' I told her, in answer to that question, that the intimacy between her and Captain Vincent had been discovered, and that Captain Grant had found her letters to Captain Vincent. She said that she had never written more than one letter to Captain Vincent, and that Captain Grant was aware of her having written that letter. She asserted that positively; and I said, 'It is a pity you should deny it, for I have the letters at this moment in my pocket;' and which, in fact, I had. But she still persisted most vehemently in denying having written more than one letter, and said that, if I had such letters as I asserted, they must be forgeries; and she also said there must be a conspiracy against her. At an early part of the interview, she asked me who I was, and I told her I was Captain Grant's solicitor; and, in the course of her denial of the letters, she asked me if it was possible that she, the mother of six blessed children, would have been guilty of such a crime; and she vehemently denied having been guilty of adultery with Captain Vincent: 'I never commit adultery with Captain Vincent—I never commit that crime with him—no person ever saw me in his arms.' This seems to her to be the criterion or proof of the crime of adultery committed by her. "Those were her precise words, and they struck me, from the peculiarity of her accent, she being a French Creole; and she repeated the words many times. She entered into

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a great deal during the hour and a half I was with her, protesting it was a conspiracy against her. After some time, Captain Grant and Mr. Macvicar returned to us, and Captain Grant said, ‘Good God! that fellow Vincent actually slept in the house.’” This was the first time Captain Grant heard of it; and it appears from the evidence of Jamieson, that she communicated it to him whilst he was up stairs searching for letters. “She said, ‘Well, Captain Vincent very kind to me and my children, and I give him bed in the house.’ Afterwards, Captain Grant asked me to produce the letters; I said that he had better not have them produced; but he persisted, and I produced them; and, on her seeing them, she said, ‘Ah, I thought they had all been received,’ or words to that effect. And she said a great deal, and with such rapidity that I could not follow; nor can I recollect all she did say, but it was to the effect—‘My mind may be contaminated—my body is pure.’” And he says, that she always throughout protested her innocence. Here is, therefore, a denial of adultery committed by her, as there had been a denial, as long as she could possibly continue it, that she had written any more than one letter to Captain Vincent: but when the letters are produced—when it is impossible to persist any longer in that averment—she then has recourse to this story, ‘My mind may be contaminated, but my body is pure.’ Still she denies an act of adultery with him; but she showed by her admission what was her sense of the letters, and that her affections and mind had been given up to Captain Vincent; for she admits that her mind was contaminated, though her body was

pure. Upon the denial of this lady of any act of adultery, the Court places no reliance whatever: but here is an admission of the letters; and her assertion with respect to them is, that though contaminated in mind, in body she is pure; and this reluctant admission must be taken in conjunction with all the other circumstances, which may not be sufficient of themselves to entitle Captain Grant to a sentence of separation from his wife: but he is clearly entitled to the benefit of a fact which she admits; and it has been so held by my learned predecessor, in the case of *Hamerton v. Hamerton*: and there is nothing in the letters which is not consistent with the supposition that, during the voyage from China to England, and during the night between the 20th and 21st, or on the morning of the 21st day of December, an act of adultery had been committed between the parties: if taken in conjunction with all the circumstances, the letters lead to the supposition and inference that adultery had taken place on some of these occasions.

These letters it is necessary for the Court to advert to. The first in date is No. 2, dated "Brighton, December 23rd, 1837," the day but one after Captain Vincent had left the house. It is written partly in English, and partly in French. It begins, "My dearest Arthur,"—a pretty strong expression from a married woman to a gentleman about to be married to another person, and who had recently left her under the circumstances I have stated,—“Those only who have suffered them, can tell the unhappy moments of separation. O my Arthur, let me speak in a language so well”—then follows a passage in French, which is translated to

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this effect:—"understood by you, and which, being more familiar to me, I wish to express to you the sentiments of my oppressed heart. Since you have disappeared from before my eyes, I have experienced the most cruel sensation. Exactly, I can tell you, in the simplicity of my heart, that the comparison absolutely is as if you had appeared to me like that beauteous star, which in nature gives by its influence life to the dying plants, and in whose absence that which is most brilliant is seen to wither and decay. I believe, Arthur, that we were formed in Heaven to be so closely united in this life; for, in truth, with the sublime sentiments and the sympathy which we feel towards each other, how delightfully would our lives have passed together! Yes, my beloved Arthur, your Maria is virtuous;"—what Mrs. Grant's notion of "virtuous" is, after these sentiments, coming from a person who is the mother of six children, and after twelve years' marriage, is somewhat difficult to understand;—"and possesses a heart which would have rendered you for ever happy. Never should we have seen a cloud approach our heads; all my joy would have been in thinking how to prove to you from day to day, how delightfully life flows on, when hearts and delicacy of sentiment are united as much as two creatures can be, the one with the other. Now, I consider myself, in the silence of this night, lonely as the solitary dove, of which our love is the emblem, in the fidelity of our hearts, inflamed with a delicious sentiment, which has made us experience that which the crowns of sovereigns cannot in an equal degree possess. With this idea, your faithful Maria will, while life

endures, never cease to cherish and respect you. Have a care, O my Arthur, not to neglect your friends, (a)—*more* than that; be the physician who ought to cure me with prudence, for my life is linked to you; you are all to me in this world. This is not alone the idea of exalted love, but it is very serious. Let us take our precautions; let us be prudent with each other. Write to me at the end of this week, under cover, and address to Margaret Jamieson, 5, Regency Square; it is better, because the good Margaret likes you; and, as she receives many letters from her friends in Scotland, it will not cause any suspicion. Have patience, and with prudence we shall, in despite of the jealous, be favoured. My wish will be, that I may at my last sigh entertain those ardent flames which you have implanted in my breast. Adieu, my dearest Arthur; I sincerely hope to hear something soon from you. I am so wretched, that I am sure God will have pity on your poor and devoted friend. Believe me yours, ever most affectionately, M. G." Now, I cannot but think, looking to the circumstances under which this letter was written, the expressions used in it, and the reference in it to the sentiments between these two persons, that they do show a great deal more to the mind of every person who has heard it, than could have passed, as the facts are pleaded, during the visit of Captain Vincent to Mrs. Grant, on the 20th and 21st days of December. What is suggested with respect to Captain Vincent's visit?—That he came down to take leave of the children; and that, during that

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(a) Here (as will be apparent) is an error in the translation, the original is "*votre amie*."

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time, there was no possibility of any opportunity being afforded of committing the act charged in the Libel. Now, if that be the case, it does appear to me very extraordinary that such a letter as this should have been produced by such a visit; that it should have been written immediately after a visit which was not calculated to excite any such extraordinary warmth in the mind of Mrs. Grant, but which did produce in her the sentiments I have read. If nothing passed on the occasion, which could give rise to expressions of so ardent a nature, I should be glad to have had some explanation of the meaning of the letter, which could give it any construction and interpretation consistent with what is alleged to have passed between these persons. Under what circumstances did Captain Vincent appear on the 20th day of December, and go away on the 21st, that he should have excited such an image in the mind of this lady, as that he appeared to her "like that beauteous star, which in nature gives by its influence life to the dying plants, and in whose absence that which is most brilliant is seen to wither and decay?" To be sure, it is a most improbable supposition, that this refers to his presence to see the children's performance under the tuition of a dancing-master and professor of music. Something else must have passed during that visit, in order to have raised such images immediately after his departure. "Now I consider myself, in the silence of this night, lonely as the solitary dove, of which our love is the emblem, in the fidelity of our hearts, inflamed with a delicious sentiment, which has made us experience that which the crowns of sovereigns cannot in an equal

degree possess." I should like to have a construction of this, consistent with perfect innocence; because it has been contended, not only that the proof is not sufficient to establish the guilt of Mrs. Grant, but that it is sufficient to prove her innocence; and I should like to know how to reconcile this letter with an opinion of her innocence. These expressions proceed not from a person of sixteen, or seventeen, or eighteen years of age, but from a lady of mature years, who had been a married woman for twelve years, and was the mother of six children, who were residing at the time with her. I should like to know the meaning of some other expressions:—"This is not alone the idea of exalted love, but it is very serious. Let us take our precautions; let us be prudent with each other. Write to me at the end of the week, under cover to Margaret Jamieson."—There seems to have been some further communication with Captain Vincent, under cover to Margaret Jamieson. "It is better, because the good Margaret likes you; and, as she receives many letters from her friends in Scotland, it will not cause any suspicion." Suspicion of what? Of Captain Vincent's writing to inform Mrs. Grant the state in which he found the lady to whom he was about to be married? "Have patience, and with prudence we shall, in despite of the jealous, be favoured." What does this mean?—for what purposes favoured? More favoured than on the night between the 20th and the 21st of December, when Captain Vincent slept in the house, totally unknown to Captain Grant? "Have patience, and with prudence we shall, in despite of the jealous, be favoured. My wish will be, that I may, at my

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last sigh, entertain those ardent flames which you have implanted in my breast." Does not this lead to an inference of what is stated by the witnesses from on board the *Lord Lowther*?—I mean the statements of Wilkins and Pyle, as to what passed in the cabin between Mrs. Grant and Captain Vincent; which is extremely probable in itself. I think it is quite idle to suppose these expressions could be called for by the circumstances stated to have taken place at the visit of the 20th and 21st of December, and that it is not consistent with the supposition that nothing more passed on that occasion.

But it does not rest here. This lady, not having heard from Captain Vincent in the course of a week, on the 29th day of December writes again a letter to this effect:—"Brighton, December 29th, 1837.—My dearest Arthur, I could not pass these solemn days"—I presume Christmas is meant, which had just passed—"without expressing to you all the wishes of this heart, so devoted to you in everything which is most exalted in love. I cannot contemplate, without extreme emotion, the state in which I was when you bade me adieu." Now, I ask whether this is consistent with the supposition that nothing more took place on the 20th and 21st days of December than is represented by Mrs. Grant? "This very day last week, I may say, fixed in her choice, and faithful, but in vain. See me neglected on the world's rude coast—the dear companion of my voyage lost." It has been suggested that this has been taken from some book she had read, and very possibly it may be so; but it is perfectly consistent with what appears in

the former letter—the great desire that Captain Vincent should continue to think of her. It goes on—“O, my Arthur, when may I hope to see you again!—if it were possible in your journey, only for half a day—like the brilliant lightning, which illuminates the uncertain steps of the traveller. I render thanks to that Divine Providence, so infinite in all the profusion of its blessings upon my sweet family.” Then follows a passage with respect to her husband. It is suggested that he was of a harsh and irritable disposition; whereas it appears from this letter that he was a kind and estimable man—she an unworthy wife. “My husband is very good and attentive in all things, which any other but myself would appreciate; but I am not worthy—I have not the power (or I am powerless.) You alone are enabled to bring me to reason; but, at present, all my weak nature is absorbed but in you alone.” This is the second letter written during this short interval, and it is very much to the same effect as the former letter; tending to show that she was not backward to commit the crime with which she is charged.

Still, unfortunately, no letter comes from Captain Vincent; and on New Year's Day she again writes to him:—“My dearest Arthur, I begin this day in offering my heart to God to bless yourself and my blessed family. I am obliged to go to London to-morrow for a week; you will be sorry to hear that your Maria”—*your* Maria!—“has received, two days ago, the most afflicting intelligence that has reached her. I pray to God to comfort me, and to enable me to sustain this heavy stroke with that resignation to His will which none but Himself

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can give. I may say, O my Arthur, with the poet —‘Doomed as I am in solitude to waste the present moments, and regret the past,’ deprived of every joy I valued most.” Then follows, in a parenthesis, “(my love torn from me,) and I have lost my blessed mother;”—an announcement which, were it not for the seriousness of the subject, would be ludicrous. “The next week will make a very melancholy impression on my heart. When I reflect, in the bitterness of this oppressed heart, that your unfortunate and too faithful Maria will be clad in the sad garments of deep mourning, and without the hope of hearing your cherished voice to console her. O, Arthur, think of your own, own devoted Maria. I acquaint you with my sorrows, because I know your precious heart. I am obliged to finish my letter, as my head is very confused. I ought to take care of myself, as I am still very delicate. Believe me yours, ever most affectionately, M. G.”

These are letters addressed to Captain Vincent by Mrs. Grant, immediately after the visit he paid to Brighton on the 20th and 21st days of December; and I am to suppose, after reading them through, on the mere suggestion of counsel, that there is nothing in them inconsistent with the innocence of Mrs. Grant; that nothing further passed on the 20th and 21st days of December, and on the morning of the latter day, than is suggested by the counsel for Mrs. Grant;—that is, that it was a mere visit of civility on the part of Captain Vincent, and that they were only about two hours in company together, without any circumstance of criminality whatever. I do not know whether it is

necessary for the Court to say whether an act of adultery was committed in the back drawing-room on the 20th or 21st day of December, where the parties were alone together a sufficient time, or whether during the night of the 21st of December, in the room of Mrs. Grant, or in the room of Captain Vincent. It is true there is no evidence to show that Mrs. Grant went down stairs to Captain Vincent's room, or that he went up from his own room to hers; but the Court cannot, looking at these letters, and at the conduct of the parties, and at their opportunities of being alone together, come to any other conclusion than that, at some time or other, an act of adultery did take place.

The other letter is on quite a different subject; it is written by her on the 18th day of January, with the assistance of a lady, who was attending the children in the capacity of governess; and this is certainly a letter which might be addressed with great propriety by a passenger on board the vessel commanded by Captain Vincent, inviting him to pay a visit at the house when he should come that way; and it appears to have been written with the full concurrence of Captain Grant; and that is the only letter which she stated, at first, that she had ever sent to Captain Vincent after his visit to Brighton.

With this view of the case, it is utterly impossible for the Court to bring its mind to believe that there has not been an improper connexion between these parties; it is impossible to conceive that Mrs. Grant would have written to Captain Vincent in these terms, unless there had been a consummation of the offence imputed to her; that is, at some time

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or other, on board the vessel, or during the visit on the 20th day of December, or on the 21st day of December, or on the night between those two days, notwithstanding there is no positive evidence to show that such was the fact, or to lead to the necessary conclusion that adultery was committed at any particular time. It is impossible for the Court to reconcile the expressions in the letters, with a supposition that the parties had not been criminally connected together.

It has been stated, that this is the first case in which the Court has been asked to come to a conclusion of adultery on letters which do not contain an express avowal and admission of the fact. But that is not a precise representation of the case as respects the letters. These letters are not to be taken as proof of the fact, independent of other circumstances; they are a proof, in conjunction with all the other circumstances during the whole intercourse of the parties. I cannot but think that all the circumstances together can lead to no other conclusion than that adultery has been committed between these parties. The letters in the case of *Hamerton v. Hamerton*, were of a different description, and under different circumstances, and the parties in that case were never seen in a situation from whence it could be inferred that adultery had been committed: all depended upon the letters, and the letters were written by a person seeking to seduce the lady, (Mrs. Hamerton;) and, looking to the character of the gentleman by whom they were addressed to her, if the seduction had been completed, the letters would have left no doubt whatever of the fact.

On the whole of the Case, diffident as the Court may be as to the opinion it has formed, I must say, honestly—founding the opinion on the whole of the circumstances disclosed by the witnesses, and on the letters which have been produced—I find myself under the necessity,—notwithstanding all the difficulty and reluctance I feel to pronounce a sentence which shall consign this lady to infamy, and separate her from her husband and her family—of saying, that my mind is made up, that this lady has actually committed the offence imputed to her; and that, therefore, Captain Grant is entitled to a separation at the hands of the Court: and accordingly, I pronounce for the separation prayed.

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This judgment was affirmed by the Judicial Committee of the Privy Council, on the 24th of February, 1840. Present

The Most Hon. the LORD PRESIDENT,
The Right Hon. MR. BARON PARKE,
The Right Hon. MR. JUSTICE BOSANQUET,
The Right Hon. the Judge of the Admiralty,
(DR. LUSHINGTON.)

PREROGATIVE COURT OF CANTERBURY.

MUNDAY *and* BERRY *against* SLAUGHTER.

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HILARY TERM.
Jan. 24th.

A. B. an executor and one of the residuary legatees under a will, on the 20th of November, renounces probate of the will (but the proxy of renunciation is not recorded until the 2d of December) and on the 22nd of November by deed of gift conveys his interest in the personal estate of the deceased to C. D. (who was also an executor) in order to render himself a competent witness to support the will.

Held, first, that the proxy of renunciation took effect from its date.

Secondly, supposing the renunciation to be invalid, that, as the interest under the will was conveyed

by the deed of gift, the party was a competent witness under the stat. 1 Vict. c. 26, s. 17.

THIS was a cause of proving the will of Thomas Chitty, who died in June, 1838, leaving both real and personal estate; of the will, executed on the day of his death, there were three executors, who were also residuary legatees. The will was propounded by Munday and Berry, two of the executors, and was opposed by Emily Slaughter, one of the next of kin: Henry Butterfield, the other executor, renounced his executorship on the 21st of November, 1838, but the proxy of renunciation was not recorded until the 3rd of December. He likewise, on the 21st and 22nd of November, conveyed by lease and release of the realty and assignment of the personalty, his share of the residue, to "Mr. John Munday, his heirs and assigns for ever, to the only proper use and behoof of the said John Munday, his heirs and assigns, for ever," for the purpose of becoming a witness in support of the will: his competency as a witness was objected to.

The *Queen's Advocate* and *Robertson*, in support of the objection. The party, as executor, has a considerable bequest; in order to render himself competent to be a witness to prove the will, he

must divest himself of all interest in the subject. The party was sworn as executor by commission, and the probate was decreed to him, and he inter-meddled with the property; on the 21st and 22nd of November he conveyed his interest under the will; he must first have acted as executor, in order to take the legacy; he then as legatee assigns his interest; this was done before the renunciation of the executorship, for the proxy of renunciation, although signed on the 21st of November, was not recorded until the 3rd of December; it was not, therefore, of any effect until then. *Long v. Symes.* (a)

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Secondly. The conveyance cannot operate as a relinquishment of interest, it is a mere deed of gift; the donor has an interest in supporting his gift; it matters not in principle whether the interest consist in supporting the disposition, or in retaining the subject of the disposition. To effect a relinquishment of interest the instrument should be a deed of disclaimer; moreover, it ought to be for the benefit of the estate, whereas here it is for the benefit of Mr. Munday alone, in his individual character. The conveyance is good for nothing as a release of interest.

Addams and Haggard, contra.

The party first renounces the executorship; he then, as a mere legatee, assigns his legacy; he has, therefore, done all he could to divest himself of any interest he might have. It may be true that the renunciation takes no effect until recorded, but when

(a) 3 Hagg. E. R. 776.

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recorded it is valid from the date of it. If Mr. Butterfield, by assigning his interest, has dealt with the property, and is, therefore, not allowed to become a witness, no executor, who is a legatee, can become a witness.

SIR HERBERT JENNER.

The question is, whether Mr. Butterfield, who is an executor, to whom, *quá* executor, one-third of the residue is given, is, by the acts he has done, compellable to take upon himself the executorship, and whether he is barred of his renunciation? On the 23rd of May a commission issued for taking the oath of the executors, under which Mr. Butterfield was sworn. It is said that there is some difference where an executor is sworn by commission; that a commissioner decrees probate; whereas, if the oath is taken before a surrogate, there is no decree; but the probate passes as a matter of course. It does not appear to me that this makes any essential difference. On the 18th of June a proctor appeared for the executors, and on the 7th of August he exhibited a proxy in the names of two of the executors; the *condidit* was given in in the names of Messrs. Munday and Berry; and on the 3rd of December a proxy of renunciation was brought in, a conveyance and assignment having been executed on the 21st and 22nd of November, which purport to convey all the interest of Mr. Butterfield to Mr. Munday, the assignment specifically reciting the pendency of this suit, with reference to which it was made. Although the proxy of renunciation was not recorded till after the assignment, when once recorded it covered what had previously been done.

The only question, then, is, whether, under the proxy of the 3rd of December the party can be examined as a witness. By the deed he has conveyed all his interest with reference to this cause. It does not appear why an executor should not be allowed to renounce because he has assigned his legacy. He could not assign it to the next of kin, for the property is disposed of to the executors generally; and if one of the executors be not entitled to claim, his legacy would survive over to the other executors. Supposing, however, that the instrument purporting to be a release of interest does not effect that object, still the object is attained by the renunciation of the executorship, the legacy being given to him *quod* executor. I confess nothing I have heard convinces me, that I should be doing an act of injustice to the other party by allowing Mr. Butterfield to be examined as a witness; but I should be doing great injustice to the party propounding the will if I were to prevent Mr. Butterfield from renouncing, whereby he divests himself of all interest. I see no reason why this gentleman should not renounce his executorship, and be examined as a witness in the cause.

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The cause then proceeded, and in Easter Term May 3rd. came on for hearing, when the *Queen's Advocate* and *Robertson* took further objections.

First. Mr. Butterfield admits, in an answer to an interrogatory, that on the death of the testator he had taken with his own hands a portion of the money found in the testator's house, for the purpose of paying the probate duty, the sum taken by him being a little more than the amount of the duty;

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May 3rd.MUNDAY
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this is such an intermeddling as constituted him an executor *de son tort*.

Secondly. Putting the intermeddling out of the question, an executor to a will falling under the statute 1 Vict. c. 26, cannot renounce in order to become a witness, he has by the 17th section the capacity of a witness bestowed upon him, a capacity or competency which cannot be *further* given to him, for *quod semel meum est, amplius meum esse, non potest*; this maxim is illustrated by Lord Coke, 1 Inst. s. 60. Even if the executor could in this case renounce, he would not be divested of all interest, for on the will being pronounced for he might, with the consent of the parties, retract his renunciation, whereby he would be entitled to his legacy; and according to the decisions at common law and equity, he might retract and claim probate at any time prior to his assenting to an administration, *Wankford v. Wankford*, 1 Salk. 307; *Arnold v. Blencoes*, 1 Cox, 426. It is clear, then, that the renunciation will not help the case; it has already been argued that Mr. Butterfield is not divested of interest by the conveyance, and as the will rests on his evidence, the Court must pronounce for an intestacy.

SIR HERBERT JENNER.

Had the Court been aware of the acts done by Mr. Butterfield, it would not have allowed him to renounce the execution of the will; but as he has conveyed all his interest under the will by an instrument which appears to be sufficient for that purpose, he is still a competent witness under the 17th sect. of the stat. 1 Vict. c. 26.

The Court overruled the objections, and pronounced for the will, but allowed the costs of the party opposing the will, out of the estate of the deceased.

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HILARY TERM.

May 3rd.

MUNDAY

and

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ARCHES COURT OF CANTERBURY.

CHESTERTON *and* HUTCHINS *against* FARLAR.

THIS cause having been remitted to the Arches Court, by the Judicial Committee of the Privy Council (vol. i. 371), the Churchwardens declared that they proceeded no further; upon which Mr. Farlar prayed to be dismissed with his full costs: this was opposed by the Churchwardens, and the question was brought before the Court on petition.

1839.

HILARY TERM.

Jan. 29th.

A party having successfully resisted payment of a church-rate, dismissed, but not with his full costs, he having put matters in plea which caused unnecessary expense.

The *Queen's Advocate* for Farlar. The Churchwardens, by proceeding no farther, have admitted the illegality of the rate and the injustice of their proceeding, and they ought, therefore, to be condemned in the costs of the suit. It is said that, besides pleading that the rate was retrospective, the party put other matters in plea, to which the Churchwardens had a sufficient defence. If this were so, which does not appear, still there was no ground for proceeding against Mr. Farlar, because the rate was an illegal one, which could not be enforced.

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Addams for the Churchwardens. There is no pretence for this application. Mr. Farlar opposed the rate, not only as a retrospective rate, but as a rate to reimburse, and also as an unequal rate, and put the parish to great expense to show that it was not unequal. His plea set forth what he knew was not matter of fact; he pleaded that persons were omitted in the church-rate who were included in the poor-rate, whereas he knew that the names were inserted in the poor-rate, by virtue of a local act. The Churchwardens admitted that the rate was in part retrospective, and Mr. Farlar might have gone to issue upon that point, without putting the Churchwardens to the expense of examining witnesses on the libel. If Churchwardens act *bond fide*, and not vexatiously, they ought not to be saddled with the costs.

JUDGMENT.

SIR HERBERT JENNER.

This question arises at the conclusion of a cause of subtraction of church-rate, promoted by the Churchwardens of St. Mary Abbots, Kensington, against Mr. Farlar, an inhabitant of the parish. The cause originally commenced in the Consistorial Court of London, where a libel was brought in, and some witnesses were examined in support of it. Mr. Farlar brought in an allegation, pleading that the rate was illegal, because amongst other reasons it was unequal, persons being omitted who were liable to be rated, and that it was in part retrospective. I understand that allegation was directed to be reformed, and additional articles were brought in; the allegation was finally admitted, and the

answers of the Churchwardens were taken upon it, who admitted that the rate was in part retrospective. In reply to this allegation, a plea was brought in by the Churchwardens, which stated that the rate was made under very special circumstances in the vestry, being an open vestry, pleading that the rate was not an unequal rate, and that the persons omitted in the rate were not liable, although under the local act they were assessed to the poor-rate. The Judge of the Consistory Court rejected this allegation altogether, and from that sentence the Churchwardens appealed to this Court, which heard the case fully argued, and was of opinion that the Judge of the Court below had done wrong in rejecting the allegation; and admitted it, for the purpose of having all the circumstances before it, in order that the question of law might be determined, on a full consideration of all the circumstances of the case. From that decision Mr. Farlar appealed to the Judicial Committee of the Privy Council, and that Court was of opinion that a part of the allegation was properly admitted by this Court (that is, as to the omission of the names), but rejected that part of the allegation pleading the circumstances under which the rate was made, it being admitted that that part of the rate was retrospective; and the Court was of opinion that the rate could not be supported, on the ground of its being retrospective, and rejected that part of the allegation; so that a part of the judgment of this Court was right, though their Lordships were of opinion that the rate could not be sustained.

When the case came down again to this Court, the Churchwardens were advised (and properly

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advised) not to proceed further in the suit, and accordingly, they declared they proceeded no further; upon which an application was made to condemn the Churchwardens in the costs. The Court thought at the time that this was not a case in which the Churchwardens ought to be condemned in the costs of the whole proceedings, as they were successful in their appeal to the Judicial Committee upon one point. The Court proposed at the time to condemn them in a certain sum, *nomine expensarum*, but against this Mr. Farlar's proctor protested, and prayed to be heard on his petition.

It has been truly stated that where Churchwardens proceed against a party for subtraction of church-rate, and fail to establish the validity of the rate, or the party's liability to it, they are subject to costs; but there are circumstances in this case, I think, which should incline the Court to the opinion that Mr. Farlar is not entitled to be dismissed with his full costs. If he had gone to issue at once upon the point as to the rate being invalid, on the ground of its being retrospective, he would have been entitled to his costs; but pleas have been given in as to other points, and witnesses have been examined as to the inequality of the rate, which made a great addition to the expense; and as this Court was of opinion that that part of the Churchwardens' allegation which related to the inequality of the rate was admissible, and that part was admitted by the Judicial Committee, consequently this Court was right in admitting, and the Consistory Court wrong in rejecting, that part of the allegation; I do not think that the Churchwardens ought to be condemned in the whole of the expenses

here. It is said that the Court had no right to assume that the Churchwardens could prove that the persons omitted in the rate were properly omitted. Undoubtedly, the Court had no right to assume that, but it could see pretty well the state of the facts, by looking at the local Act of Parliament. Under these circumstances, therefore, where the proceedings have taken this shape, it would be a hard measure to deal out to the Churchwardens to condemn them in the whole costs: I think part of the costs were unnecessarily incurred by the conduct of the other party.

I am of opinion that by condemning the Churchwarden in 40*l. nomine expensarum*, I shall meet the justice of the case: I accordingly condemn them in that sum.

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PREROGATIVE COURT OF CANTERBURY.

Wood and others, against GOODLAKE, HELPS, and others, and HITCHINGS.

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JUDGMENT.

HILARY TERM.

Feb. 20th.

SIR HERBERT JENNER.

The deceased died on the 20th of April, 1836, possessed of real and personal estate, together of the value of about 1,000,000*l*.

Two papers, A and B, alleged

This case comes before the Court under very extraordinary circumstances, whether it be considered with reference to the character of the deceased party himself, the immense amount of property which is at stake, the manner in which that property is alleged to have been disposed of, the instruments by which that disposition is said to have been

to have been found, at the deceased's death, in his fast-locked repositories, annexed together by wafers, and sealed up in an envelope, indorsed, "The Will of James Wood, Esq., 2nd and 3rd December, 1834," were propounded as together containing the will.—A, which was headed "Instructions for the Will of me, James Wood, Esq., of Gloucester," was dated 2nd of December, 1834, and was signed by the deceased, but not attested, purported to appoint four gentlemen by name executors, to desire them to take possession of his personal estates, subject to the payment of debts and "such legacies as I may hereafter direct," and to declare he would dispose of his real estates by writing indorsed thereon—Paper B, a separate paper, dated 3rd December, 1834, signed by the deceased, and attested by three witnesses, began, "I, James Wood, Esq., do declare this to be my will, for disposing my estates, as directed by my instructions" gave all his real and personal estates "which I may not dispose of" and "subject to my debts, and to any legacies or bequests of any part thereof, which I may hereafter make" &c. "to my executors" not naming, or otherwise describing them. Both papers were very informal, were in the handwriting of one of the executors (the deceased's attorney) and ultimately appeared to have been, by such attorney, annexed together, sealed up in the envelope, indorsed, and locked up in the deceased's bureau during his last illness, and, without his directions or knowledge, *held* that the presumption of law, that instructions are superseded by the execution of a will, was not repelled, that the two papers not being published together, as the will of the deceased, nor annexed with his knowledge; and A, not being unequivocally referred to in B, A formed no part of the deceased's will, that consequently the interest of the four parties named in it as executors, was at an end, and that there was no party before the Court with an admitted interest, who could propound B, pray probate of it, or administration with it annexed: The Court, therefore, pronounced against A, made no decree as to B, and condemned the parties propounding A, and B in the costs of one of the next of kin.

Another paper propounded as a codicil, by legatees named in it, opposed by the asserted executors, and by all the next of kin, dated July, 1835, alleged to be an holograph of and signed by the deceased, and to have been sent in an anonymous note, by the threepenny post to one of the legatees, leaving legacies, amounting altogether to 210,000*l*., and referring to a legacy in another codicil, not forthcoming, which paper was partially torn, and partially burnt, and was alleged to have been so done, and other testamentary papers, to have been destroyed, after the deceased's death, or in his lifetime unknown to him, *held*, that, as the evidence of handwriting was contradictory, though the affirmative preponderated, and the disposition was probable, the Court could not judicially pronounce the codicil to have been the act of the deceased, and consequently would not inquire whether it were cancelled or not, or, if cancelled, whether such cancellation was the act of the deceased.

carried into effect, the manner in which, and the persons by whom, they or some of them were prepared, the manner in which they were kept after the alleged execution of them by the deceased, the place, or the places, rather, in which they were deposited, the manner in which they appear to have been dealt with, not only during the deceased's lifetime, but after his death, the steps which were taken to obtain probate of them in this Court, and the manner in which that probate was prevented from issuing, and, finally, the mysterious appearance of a further testamentary paper, in a subsequent stage of the proceedings, together with the change in the character of those proceedings which was necessarily introduced by the production of that latter instrument, the part which has been taken by the several persons who are interested in establishing or setting aside those instruments, together with the nature and extent of the evidence which has been produced by them in support of their respective cases. All these circumstances taken together, form a case of such a complicated nature, as has scarcely ever been presented to the notice of the Court at any anterior time.

It is true, that the long and elaborate arguments which were addressed to the Court at the hearing of the cause, by all the counsel who advocated the cases of their respective clients, (a) have tended to elucidate the case, and to free it from some part of the difficulties by which it was originally sur-

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 WOOD
and others,
against
GOODLAKE,
HELPS,
and others,
and
HITCHINGS.

(a) The cause was argued on the 10th, 13th, 15th, 17th, 18th, 20th, 21st, and 22nd of Dec. 1838, by the *Queen's Advocate* and *Addams*, for the executors; *Phillimore* and *Haggard*, for Mrs. Goodlake; *Burnaby* and *Jenner*, for the Codicil; and *Curteis*, for Mr. Hitchings.

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rounded ; but there was still enough remaining behind to call for, and I hope to have obtained, the serious and attentive consideration of the Court to all the circumstances that are connected with it.

The question which the Court has to determine, arises with respect to papers which are propounded as containing the will of Mr. James Wood, who died upon the twentieth of April, one thousand eight hundred and thirty-six, at the age of about eighty years. The testamentary papers before the Court are three in number. Two of them, which bear date respectively upon the second and third of December, one thousand eight hundred and thirty-four, are propounded as containing together the will of the deceased ; and both those papers are in the handwriting of Mr. Chadborn, the confidential solicitor of the deceased, who appears to be named in one of them as an executor, and one of the universal legatees. That paper purports to appoint four gentlemen executors, and to desire that they would retain to themselves all the deceased's ready monies, securities, and personal estate, subject to the payment of his just debts, and such legacies as he might hereafter direct ; and it is described, " Instructions for the Will of me, James Wood, Esq., of Gloucester." That paper purports to have been signed by the deceased, but it is not attested by any witnesses.

The second paper bears date upon the third of December, that is, the day following, in the same year, one thousand eight hundred and thirty-four, and was executed by the deceased in the presence of three witnesses ; and it purports to dispose of all the estates, real and personal, of which the deceased

was possessed, to "go amongst his executors and their heirs, in equal proportions, subject to my debts, or to any legacies or bequests of any part thereof, if any, which I may hereafter make." That, therefore, is a will complete, as far as disposition goes, by disposing of the whole real and personal estate of the deceased to his executors, though the executors are not named in that instrument.

The third paper bears date in the month of July, one thousand eight hundred and thirty-five; it has no day of the month affixed to it, but simply bears date in July, one thousand eight hundred and thirty-five. That paper is alleged to be all in the handwriting of the deceased; it is stated to have been signed by him, and it bears, or purports to bear, the signature of the deceased at the conclusion of the instrument; but it is not attested by witnesses, and the purport of it is to give legacies, to a very large amount, to certain individuals who are therein named, and also to the Corporation of Gloucester, to which body, it recites, that the deceased had, by a former codicil, given a very large sum, namely, one hundred and forty thousand pounds; and it directs that sixty thousand pounds, in addition, should be given to that body, for the same purposes as he had before expressed. To the particular contents of these instruments, it may be necessary for the Court hereafter to advert more minutely; at present, it is quite sufficient merely to state their general purport, and the manner in which they appear to have been executed by the deceased.

There are traces in the evidence of other testamentary papers having been executed by the de-

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ceased, independently of that codicil which is recited in the paper of July, one thousand eight hundred and thirty-five, to have been executed by him, but which is not forthcoming. I mean a will which was executed, as stated, in the year one thousand eight hundred and twenty-three, or one thousand eight hundred and twenty-four, and is spoken to by a witness of the name of Smith, which he saw ; and also another paper, which is spoken to by a witness of the name of William Moore, junior, which he saw in the year one thousand eight hundred and thirty-three ; but those papers are not forthcoming, nor are their contents, with the exception of one or two particulars to which the Court must advert, at all before the Court. With respect to those papers, it is mentioned by Mr. Smith, and also by Mr. Moore, and I think also by Mr. Higham, that the deceased complained that he had lost certain papers, that they had been taken away without his knowledge, and that they were not forthcoming.

Now, the history of the deceased, which it is necessary to advert to, for the purpose of understanding and making more apparent the grounds upon which the Court has formed its opinion as to the decision which it ought to pronounce in this case, is shortly this : He appears to have been a native of Gloucester, and to have carried on business there as a draper and a banker for many years, as his father and grandfather had done before him. He was a man of some peculiarity and eccentricity of character ; extremely parsimonious, as it seems ; and by his parsimony, by strict attention to his business, and by certain adventitious circumstances

namely, the bequests of property to him from parts of his own family and from other persons, he had, at the time of his death, amassed property to the amount, both real and personal, of nearly a million of money. The amount of the property is stated differently by the parties in this cause; one of them states the personal property to amount to a million of money, and the real property to two hundred and fifty thousand pounds, or thereabouts; the other parties state, that the personal property amounted to about eight hundred thousand pounds, subject to a deduction of seventy-five thousand pounds, for debts, and that the real and copyhold property amounted to about ninety-eight thousand pounds. But it is immaterial whether it amounted to nine hundred thousand pounds, or eight hundred thousand pounds, or a million of money; it is enough to say, that it was to an extent which would render the interest of the several parties concerned in these proceedings of great importance to them.

The testator was unmarried. He had had two sisters; both of whom had died during his lifetime; one of them, an unmarried lady, in the year one thousand eight hundred and twenty-four, and the other, Mrs. Willey, who died in the month of April, in the year one thousand eight hundred and thirty-three, a widow, without children. His nearest relations, it should seem, at his death, at least so far as the Court has the means of knowledge, were two second cousins, both of them parties in this suit; no persons claiming to be related in a nearer degree, or in the same degree, have appeared in the Court.

One of these is a Mrs. Goodlake, the other a Mr.

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Hitchings. The interest of Mrs. Goodlake has been admitted by the parties who are propounding the papers of the second and third of December, as the will of the deceased: but I am not aware that her interest has been admitted by any other parties in the cause. Mr. Hitchings has been admitted as a contradictor to the will, by the parties who are interested in propounding and establishing that will; but his interest, as I understand, has not been admitted by any of the other parties; but being admitted to be a contradictor to the will, his interest is just as much under the protection of the Court as if he had been called upon to propound that interest, and had accordingly done so, and established it to the satisfaction of the Court; and it would be the height of injustice if it were not so, because it would prevent him from having that benefit which he would have derived from going on to propound his interest, and to establish it by proofs, putting the parties to a very unnecessary degree of expense for that purpose, and also creating considerable delay in proceeding to the termination of the cause. And in this case more particularly, Mr. Hitchings would be entitled to be so protected, because he has offered to the Court an allegation pleading his relationship to the deceased, and annexing to that allegation copies of certain wills and documents, which tend strongly to establish his interest, and which are in the registry of the Court, and which would be admitted, the originals being there, as proof of the interest of the party.

It is right to state in this stage of the proceedings, that Mr. Hitchings offered that allegation to

the Court for admission. The Court, however, considering that the time at which it ought to have been offered had gone by, and that it did not contain that which was pleadable at that stage of the proceedings, was of opinion to reject that allegation, and did reject it. Mr. Hitchings appealed to the superior Court, to the Lords of her Majesty's Privy Council, constituting the Judicial Committee, and their Lordships were of opinion that this Court had not done right in rejecting that allegation, and therefore reversed the sentence of this Court, pronouncing, therefore, for the appeal of Mr. Hitchings, but remitting the cause, as I understand, with an intimation of their opinion that the allegation, though it ought not to have been admitted, ought not to have been rejected by the Court: but that the admission of it ought to have been suspended till the hearing of the cause, in order that if the Court thought it necessary for the ends of justice that it should be admitted, it might have the opportunity of doing so, and of permitting it to go to proof, and thereby giving an opening to the other parties to respond to that allegation, if they had any thing to plead by way of answer to it.

I have stated this, at the present moment for the purpose of putting the parties in a situation in which they may be without prejudice, if it should be necessary for them to prosecute an appeal from the decision of this Court. I do not at present see, nor did I on the hearing of the cause, nor from what has subsequently occurred, any necessity for the admission of the allegation. I, therefore make no order for its admission. I do not admit it, I do not reject it, but I retain it in the state in which it was sent back to this Court, and, therefore, the party

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will have an opportunity, if that should be necessary, either of appealing himself, or of adhering to any appeal that may be prosecuted from the sentence of this Court. And I am anxious to put the party in such a situation that he may not be prejudiced by any act done by this Court. I think I cannot put it in a better form than that, by saying that I do not admit and I do not reject this allegation. The party will, therefore, have an opportunity of appealing to the superior Court, if it should be necessary, for their Lordship's directions as to what course should be pursued.

These two persons then, Mrs. Goodlake and Mr. Hitchings, must be taken to be in that degree of relationship which they represent themselves to be, and in case of an intestacy, to be the only persons who would be entitled to this personal property of the deceased, amounting to at least seven or eight hundred thousand pounds. It does not appear by any of the proceedings in this cause, who is the heir-at-law of the deceased, who would succeed to his real property. And that might perhaps not be a very immaterial circumstance to be considered, inasmuch as if the Court should be of opinion that the papers (A) and (B) do contain the will of the deceased, it may affect the interest of that heir-at-law, by pronouncing for those two papers as together containing the will of the deceased, and that the four gentlemen whose names appear in the paper of the second of December, are the executors; the possible construction, may be, I say the possible construction, for I give no positive opinion upon it, that the executors named in that first paper, though not named in the second, would, under the second paper, take the whole of the real property of the

deceased, that paper being executed in the presence of three witnesses, with all the necessary formalities, to pass the real estate. But, it does not appear who is the heir-at-law of the deceased. On one occasion a party represented himself to be his heir-at-law, and the deceased observed that he was not his heir-at-law, for his heir-at-law was in America; but it is immaterial to consider this part of the case any further. Mrs. Goodlake and Mr. Hitchings have appeared in the cause by different proctors, and by different counsel, and have not joined together in the assertion of their claims, nor have they admitted the interest of each other. They have no privity with each other, and they do not choose to join in the assertion of their claims, and there may possibly in the sequel appear to have been very sufficient grounds inducing them to take that step.

Of the two papers propounded as together containing the will of the deceased,

The first, paper (A), is described as

“Instructions for the Will of me, James Wood, Esquire, of Gloucester.

“I request my friends, Alderman Wood, of London, M. P.; John Chadborn, of Gloucester; Jacob Osborne, of Gloucester, and John Surman Surman, of Gloucester, to be my executors and I appoint them executors, accordingly.”

So that, as far as those instructions go, supposing the paper to be the act of the deceased, there is not only a request to those gentlemen that they will take upon themselves the office of executors, but also an express appointment of them as such.

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“ And I desire that they will take possession of and retain to themselves all my ready moneys, securities, and personal estate, subject to the payment of my just debts, and such legacies as I may hereafter direct. And with respect to my real estate, I shall dispose of the same to such persons and in such parts as I shall by any writing indorsed hereon direct.”

Not mentioning what is to become of the property more particularly than the words upon the face of it, “ After the payment of the debts and legacies which he might hereafter direct,” but to retain to themselves, and, therefore, as I presume, for their own benefit, there being no other directions given, the whole of the personal estate of the deceased; the ready moneys, securities, and personal estate, after the payment of his just debts and legacies; and, therefore, under that paper, so far as the intentions of the deceased are expressed by way of instructions for his will, for upon the face of that paper it purports to be nothing more, they would be the executors and universal legatees. But the paper also refers to real estate; it goes on in these words:

“ And with respect to my real estate, I shall dispose of the same to such person and in such parts as I shall by any writing indorsed hereon direct. Witness my hand, this 2d December, 1834.

JAMES WOOD.”

And there is an indorsement upon the paper,

“ 2d December, 1834. Mr. Wood’s Instructions for his Will.”

This paper, therefore, purports to dispose of the whole of the personal property of the deceased in favour of the executors, reserving the disposition of his real estate to be made by writing indorsed upon it.

The second paper (B), that of the third of December, one thousand eight hundred and thirty-four, was originally upon a separate sheet of paper. It is not, therefore, a writing indorsed upon that sheet which contained the instructions for the will, as was intended to be the case, according to the contents of that first paper: but it was a separate sheet of paper, and was to this effect:—

“I, James Wood, Esquire, do declare this to be my will for disposing my estates as directed by my instructions. I declare my wish that my executors shall have all my property which I may not dispose of, and that all my estates, real and personal, shall go amongst them and their heirs in equal proportions, subject to my debts and to any legacies or bequests of any part thereof, if any, which I may hereafter make. In witness whereof I have to this my last will set my hand, this 3d December, 1834.

“JAMES WOOD.”

“Signed and published by the said testator as and for his will in our presence,

“ANN LEWIS,

“EDWARD SWANN,

“WILLIAM VEAILE.”

This paper, then, is described as the last will of the deceased, and is subscribed by him as such; and it disposes of the whole of his real and personal

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estate to the executors without naming those executors. It does not give the property in the same manner to the executors as the former paper had given it, or rather purported to have given it, because by that paper they were to retain to themselves the personal estate of the deceased, being therefore joint tenants, whereas in this latter paper they are made tenants in common; that is, under the first paper, if either of the executors, universal legatees, had died during the lifetime of the testator, the benefit which was intended for him, there being no words of division or separation, would have gone, as I apprehend, to the surviving executors; whereas under the second paper, if any one of them had died during the lifetime of the testator, his property, there being those words "in equal proportions to them," would have descended to the next of kin of the deceased, as undisposed of by the will: it would, in fact, have become a lapsed legacy, and had three out of four of the executors died, the surviving executor would have taken a fourth part of the property, and the other three-fourths would have descended, the personal estate to the next of kin, and the real estate to the heir-at-law. But it is immaterial to consider those circumstances any further, because the four executors named in the first paper have all survived the testator, and therefore there is no lapse, and nothing to descend to the next of kin or to the surviving executors; but the circumstance having been noticed in the argument, the Court thought it right to advert to it.

This latter paper, as I have already stated, names no executors, it merely says, "my wish is

that my executors shall have all my property which I may not dispose of;" and therefore, standing by itself and alone, it is clear that it can have no practical effect whatever; there are no persons named who can take the estate, either real or personal, of the deceased. On the part, therefore, of those gentlemen who are named as executors in the former paper, it is endeavoured, by the proceedings in this cause, to obtain probate of the two together as containing the will of the deceased, so that, by annexing them together, the persons for whom the whole property of the deceased was intended would appear by the names of those persons who are inserted in the paper of the second of December, one thousand eight hundred and thirty-four. That is the effect of those papers considered separately and together.

The third paper which is introduced into this cause bears date, as I have already stated, in the month of July, one thousand eight hundred and thirty-five; no date of the day of the month being affixed to that paper. The purport of this paper is very materially to diminish the interest which would be given to the executors if the two former papers stood alone, and were considered as established as the will of the deceased; for it gives, I think, legacies to the amount of about two hundred and ten thousand pounds; it is propounded by several of the legatees who are named in it—by the Corporation of Gloucester, to whom it purports to give sixty thousand pounds, in addition to one hundred and forty thousand pounds recited to have been given by a former paper, which is not forthcoming; it is propounded also by Mr. Phillpotts, to

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whom a legacy of fifty thousand pounds is given ; by Mr. George Counsel (whose name is spelt in this paper Council), to whom a legacy of ten thousand pounds is given ; by Mr. Helps, of Cheapside, London, to whom a legacy of thirty thousand pounds is given ; by Mr. Thomas Wood, of Smith-street, Chelsea, to whom a legacy of twenty thousand pounds is given ; and by Mr. Samuel Wood, of Cleveland-street, Mile End, to whom a legacy of fourteen thousand pounds is given, and to whose family a legacy of six thousand pounds is given. The paper goes on to confirm all other bequests, and to give the residue of the property to the executors for their own interest. It is signed " James Wood, Gloucester City Old Bank, July, 1835," and it appeared at the time when it was brought into the Court to have been mutilated to a certain extent ; that is, it was burnt at one corner, and torn in one or two places, though not quite through the paper, one tear going through and dividing the Christian name from the surname of the deceased.

In this paper also, there is a legacy of twenty thousand pounds given to Mrs. Elizabeth Goodlake, mother of Mr. Surman ; she does not, however, propound this codicil, but, on the contrary, opposes it.

Mr. Phillpotts, one of the legatees, appeared by a proctor and a counsel in the earlier part of these proceedings. At the hearing of the cause, he appeared by his proctor, but not by counsel, and an application was made to the Court to-day that it would permit a learned counsel of the Court to offer and to read an affidavit to it, which Mr. Phillpotts had thought necessary to make for the justification

of his conduct, in consequence of certain observations which had been made upon it in the course of the arguments which had been addressed to the Court on the hearing of the cause, but the Court was of opinion, and still is of opinion, that it would be improper to permit such an affidavit at this time to be read, that it would be contrary to all the rules and proceedings of this Court to permit anything which had a reference to the proceedings to be heard when the arguments were all closed, and when the Court was prepared to give its opinion upon the whole case ; for what would the consequence be ? The Court has not seen the affidavit, nor heard the contents of it stated, but it is quite clear from what has appeared in this cause, that it must have reference to some of the evidence which has been produced, for I entirely accede to what fell from *Dr. Phillimore*, that nothing occurred in the argument in this Court, and no observations were made to the Court, but such as were founded upon that which is stated either in the evidence or in the answers of the parties which have been read to the Court, and were made evidence in the cause. What the effect of that would be as implicating Mr. Phillpotts in any of the proceedings connected with some of these papers, is a question which the Court undoubtedly must hereafter consider, when proceeding to give its opinion upon the case ; but in this stage of the proceedings to hear an *ex parte* representation which goes to affect the evidence upon the mere affidavit of a party would, I conceive, be the height of injustice to all, and would probably lead to an affidavit in reply ; the Court therefore, is clearly

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of opinion that it could not, with propriety or justice to the other parties, permit the affidavit to be read or the contents of it to be stated.

Now this paper of July, one thousand eight hundred and thirty-five, is opposed by the executors named in the paper of the second of December, one thousand eight hundred and thirty-four, and by Mrs. Goodlake. Mr. Hitchings, who appeared in a later stage of the proceedings, has also declared that he opposes that paper; at first there was some doubt whether he opposed it or not, but subsequently Mr. Hitchings opposed that paper, as he was absolutely bound to do under the circumstances in which it appeared before the Court. But the different manner in which these parties have conducted their opposition to the several papers propounded is somewhat extraordinary. Mrs. Goodlake certainly appears here as opposing the will, but her opposition to the will has been extremely faint, and the circumstances under which that opposition has been given in the earliest stages of the proceedings, the Court will presently observe upon. She is, however, strenuous in her opposition to the codicil. On the other hand, Mr. Hitchings, who appears as next of kin in the cause, opposing both these papers, has directed the whole force of his observations against the will, whilst the opposition on his part to the codicil has been, as in the case of Mrs. Goodlake with respect to the will, extremely faint, and the Court is placed in a situation of considerable difficulty with respect to the manner in which these parties have come forward, and the different interests, which, in fact, though not in name, they seem

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to appear to protect and to assist. It appears, then, that there are five parties before the Court, represented by seven counsel and five proctors. There are first the executors named in the will; secondly, the general body of legatees named in the codicil as it is called; thirdly, Mr. Phillpotts, who appears by proctor, but not by counsel; fourthly, Mrs. Goodlake; and fifthly, Mr. Hitchings, as next of kin; and all these learned counsel have been heard by the Court with great attention and with great satisfaction, inasmuch as the arguments on all sides have been most elaborate and able.

Having now stated the general circumstances with respect to the papers and their contents, it will be necessary to see the course which the proceedings have assumed in bringing the whole of the case to the notice of the Court.

The death of the deceased occurred between eleven and twelve o'clock upon the night of the twentieth of April, one thousand eight hundred and thirty-six, he having been taken ill on the Sunday immediately preceding. Whether there was any illness upon the Saturday night or not seems to have been a matter of dispute in the argument, but it appears to me to be perfectly immaterial. On Sunday morning, the seventeenth, he was undoubtedly taken ill, and to such an extent as to induce Mr. Osborne, one of the gentlemen who was in the deceased's house, to dispatch a letter to London, to Mr. Alderman Wood, to inform him of the deceased's illness, and to request that he would communicate it to Mr. Chadborn also, who was at that time in London, attending upon some business he had in Parliament.

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The letter is annexed to the answer of the executors, marked No. 2, and is to this effect:—

“ *City Old Bank, Gloucester,*
17th April, 1836.

“ My dear Sir,

“ I should be obliged to you to mention to Mr. Chadborn, as he wished to be informed in case any thing happened during his absence to Mr. Wood, that he was this morning taken so poorly as not to be able to dress himself, and has such a tightness on his chest as to almost prevent him breathing.

“ I am, dear Sir,

“ Your's very truly,

“ J. OSBORNE.”

Mr. Osborne had been an assistant to the deceased in his business between thirty and forty years, and is one of the executors and universal legatees in the paper of the second of December, one thousand eight hundred and thirty-four. On the day on which this letter was received, namely, on the Monday, the eighteenth, Mr. Alderman Wood left London by the mail, and arrived at Gloucester upon the next morning.

Upon his arrival there the deceased, though still very unwell, had in some degree recovered from the attack, and in the course of that day medical assistance was called in. Mr. Cother, the medical attendant who was called in by Mr. Alderman Wood himself, prescribed some medicine for the deceased, who it seems on that day, the Tuesday, had been down stairs in his bank, and also in a room adjoining to it, and remained down stairs till

about ten o'clock at night, when he went, or rather (as it should seem by the information given to Mr. Cother by Mr. Alderman Wood) was carried or dragged in a chair up stairs to his bed, from which he never afterwards rose.

On the next morning, at about eight o'clock, Mr. Cother attended upon the deceased, and found him in a state of extreme drowsiness, which he attributed principally to the medicine, namely, a combination of calomel and opium, but at that time it was not apprehended that the deceased was in any immediate danger; but at eleven o'clock, when Mr. Cother attended him the second time on that day, the drowsiness was discovered to have proceeded from pressure upon the brain, and Mr. Cother states that at that time he considered the deceased's recovery, if not altogether hopeless, yet improbable; and it appears that from that state of drowsiness or stupor, he was never roused but continued in the same state, without any possibility of being consulted upon any business, till about half-past eleven o'clock on the same night, when he died. At this time all the executors were assembled at the house of the deceased. Mr. Alderman Wood, as I have stated, had arrived on the preceding day (the Tuesday); Mr. Osborne and Mr. Surman were resident in the deceased's house; and Mr. Chadborn, who had been prevented from leaving London by parliamentary business on the eighteenth (the Monday), having been released from the necessity of his attendance upon Parliament on the Tuesday, left London that night, and arrived at Gloucester on the morning of Wednesday, the twentieth.

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On the morning of the twenty-first, Mr. Phillpotts, who is described as an intimate friend of the deceased, attended at the house, and in company with Mr. Osborne, proceeded up stairs to a landing-place, or lobby, which adjoined the room where the deceased slept, and where Mr. Osborne slept, where they found a bureau which was locked up, the keys of which were in the possession of Mr. Osborne, and which he opened, and from which Mr. Phillpotts took a sealed packet, which he carried down stairs to the room where the executors were assembled together. The seal of that packet was broken, and it was found to contain the two papers of the second of December and the third of December, one thousand eight hundred and thirty-four. The Court, at the present moment, does not stop to inquire how or when the papers were deposited in this bureau, as that must necessarily form a subject of observation in a subsequent part of the proceedings: the Court is now merely referring to the facts in the case for the purpose of tracing the steps by which the case was brought originally to its notice.

Upon the same day instructions were given to the proctors of the executors, desiring them to send a commission for the purpose of swearing them, preparatory to obtaining probate of these two papers. This commission, as I understand, was forwarded upon the night of Saturday, the twenty-third, to Gloucester, and was executed on Monday, the twenty-fifth, when it was returned to the proctors in London, with the testamentary papers, Nos. 1 and 2, annexed to it, and also an affidavit of Mr. Phillpotts, as to the finding of those papers, and the plight and

condition in which they were at the time when they were taken from the bureau.

When these papers were returned to the proctors, application was made for probate of them, but a *caveat* had been entered by Mr. Jennings, on behalf of some party whose name did not at that time appear in the proceedings, and there being no other party before the Court but Mr. Barlow, who appeared on behalf of the executors, Mr. Jennings was assigned to set forth his client's interest by the next Court. It does not appear upon the proceedings that Mr. Jennings took any further steps, the party for whom he had appeared being a nominal party.

Upon the sixth of May, no further steps having been taken, Mr. Barlow appeared before a surrogate, and again prayed probate of these papers. Mr. Pulley then appeared for John Thomas, who is a nominal party in this Court, and he was then assigned to set forth his client's interest by the fourth session of that term, otherwise, according to the terms of the decree, probate was to pass to Mr. Barlow's parties, the executors.

Now, the Court thinks it right here to observe, that at this time the papers were not before the Court; they had not at this time been brought into the registry. The commission for swearing the executors had not then been returned, and therefore the nature of the papers and their character and description were not known to the registrar of the Court, and that part of the assignation, therefore, which proceeded to decree that probate, should pass to the executors, in the event of Mr. Pulley not complying with the assignation of the Court to set

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forth his client's interest, was a mere formal assignation; it did not follow as a matter of course that probate of those papers would be permitted to pass in that form when they were seen by the Court; and I mention this that it may not go forth to the world that so much facility of obtaining probate of papers of this description would be afforded by the proceedings and practice of this Court as would seem to be intimated by that part of the assignation which is in these words—"otherwise probate to pass to Mr. Barlow's parties."

On the fourth session (thirteenth of May), Mr. Pulley appeared for two parties, Mr. Thomas Wood and Mr. Thomas Helps, and alleged them to be two of the next of kin of the deceased, exhibiting a proxy from Mr. Helps, and praying an answer to his client's interest. Mr. Barlow then exhibited a proxy from the executors, and denied Mr. Helps's interest, and Mr. Pulley was then assigned to declare whether he would propound his client's interest or not by the first session of the next term. Then comes the assignation, which clearly shows that the papers were at that time in the possession of the proctor, and not of the Court or the Registrar; for it is to this effect: "Longden (proctor for the executors) returned commission, with affidavit of John Phillpotts, and also affidavit of the said John Phillpotts and William Price, and also affidavit of Matthew Wood and of the said John Phillpotts, with Scripts, marked (A), (B), and (C), annexed." That is the first time, as I apprehend, that the papers were brought to the notice of the Court or of the Registrar, and then it would be that an inspection of the papers would be made, to

see whether they were in such a state as to be entitled to probate in common form : if they had been brought into the registry without notice to the registrars, the papers would not have been examined in that stage, to see whether probate should pass or not.

Now, on this occasion (on the day when an appearance was given for Mr. Wood and Mr. Helps), an appearance was given by a proctor for Mrs. Goodlake, alleging her to be a second cousin of the deceased, and his only next of kin ; and he prayed an answer to his client's interest. The interest of Mrs. Goodlake was immediately admitted by the proctor for the executors, and I presume that that admission was made in consequence of special instructions from the parties, as I find that the proxy only authorizes the proctor to deny the interest of the asserted next of kin, and that he had no authority to admit the interest of any party claiming to be next of kin. I mention this circumstance, because, in conjunction with others, it satisfies me that Mrs. Goodlake was before the Court as a mere nominal opponent, doing, in fact, all she could to further the interest of the executors ; that it was a mere formal opposition, to enable the executors to obtain probate of these papers. That Mrs. Goodlake was a party likely to offer any effectual opposition to the papers, is impossible to be predicated of her ; seeing the steps taken by her and by the executors, it is clear that her wish, up to the hearing of the cause, was, that the executors might succeed in establishing the papers before the Court.

At this time, then, the papers were first brought before the Court, and annexed to the commission

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was the affidavit of Mr. Phillpotts, which was to show that the papers were found in the repositories of the deceased, on the day immediately succeeding his death, sealed up in an envelope, the envelope being indorsed, "The will of James Wood, Esq., 2nd and 3rd December, 1834;" and the seal upon the packet inclosing them bearing the impression of the deceased's initials, "J. W.;" and to show that these papers were found precisely in the same state and condition in which they were brought before the Court, with certain exceptions, such as breaking open the seal, and one or two other slight circumstances; but that there was no alteration made in the substance or appearance of the papers. Now this affidavit is a very material affidavit. It is dated the twenty-fifth of April, and it expressly states that the deponent, "as a confidential friend of the said deceased, in searching amongst the deceased's papers of moment and concern, found in the private drawer of a bureau, which was locked up in a closet adjoining the bed-room, in which the said deceased died, the envelope marked C., hereunto annexed, indorsed, "The will of James Wood, Esq., 2nd and 3rd Dec. 1834;"—that indorsement being (as it subsequently appeared) in the handwriting of Mr. Chadborn;—"which envelope, being sealed up, was then opened by this deponent; and upon opening the same he, this deponent, found the paper-writings now hereunto annexed, and respectively beginning and ending as aforesaid, enclosed therein. And this deponent, having now perused and inspected the said several papers, marked (A), (B), and (C), respectively, saith, that the said paper-writings are now

in every respect in the same plight and condition as when so found by him as predeposed ; save only that the seal of the said envelope was broken open by this deponent, at the time of finding the same." And he further makes oath, that no other paper-writing of a testamentary nature of or belonging to the deceased was found by him.

Now nothing could be more satisfactory to the Court than the facts stated in this affidavit. The appearance also of the papers, which are sworn to have been in the same plight and condition as when found by him in this bureau of the deceased, still locked up, coupled with this affidavit of Mr. Phillpotts, seemed to exclude the possibility of any doubt that these papers did contain, as they were afterwards alleged to contain together, the will of the deceased, notwithstanding one of them, upon the face of it, purported to be instructions only, and notwithstanding the latter was a regularly executed will, purporting to dispose of the whole property, real as well as personal, although it did not name the persons to whom that property was to go.

These two papers appear to have been written upon two sheets of foolscap paper, separate at one time, but when brought into Court carefully attached together by wafers at the top and bottom. The first side of the sheet of paper contains the instructions for the will, and occupies a great portion of one side of the paper. The next side of the paper is blank, that is, the second side of the first sheet of paper. The next side, being the first side of the second sheet of paper, contains the will of the deceased, dated the third of December, and occupies the greater portion of that side of the

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paper. The remaining sides are blank, with the exception of the last side of the first sheet, which forms the outside cover of the whole, which is indorsed, "2nd December, 1834. Mr. Wood's instructions for his will." At one time, therefore, these two papers were not in the state in which they are now.

When the papers were brought into the Court, they were described as having been found in the repository of the deceased, locked up, enclosed in an envelope, sealed with a seal bearing the impression of the deceased's initials : and being so brought in, they had every appearance of being one instrument, authenticated by one attestation ; and, under these circumstances, it is stated by the counsel for the executors, that probate in common form was applied for on the affidavit of Mr. Phillpotts, and was only stopped by *caveats* which had been entered against the passing of that probate. The appearance, however, of the papers, and the affidavit of Mr. Phillpotts, would not, as I presume, have been considered in the registry as sufficient to entitle them to probate in common form, without at least the directions of the Court ; because, when a paper appears upon the face of it to be mere instructions for a will, the mere annexation of that paper to another which purports to be a will, and an affidavit of their being found in the plight and condition in which these were found in the repositories of the deceased, are not, *prima facie*, sufficient to entitle such papers to proof without special application to the Court ; and I am quite certain that, if probate had been applied for in that form to the Registrars of the Court, they would have referred the matter

to the Court; and if a motion had been made for probate in common form to pass upon the affidavit of Mr. Phillpotts, coupled with the appearance of the papers, and if urgent cause had been shown why probate should pass without any unnecessary delay, in order to prevent inconvenience to persons who might have deposited cash with the deceased at Gloucester, the Court would not, even under those circumstances, have decreed probate to pass, unless it had had the consent of the next of kin, even if under such circumstances and with that consent it would have suffered it to pass. Looking at the vast amount of property to be disposed of, and the interests of the persons that might be affected by it, the Court, under all these circumstances, would not have decreed, and ought not to have decreed, probate to pass in common form, but would have required at least a decree to be taken out to be served upon the next of kin, including a general citation to all persons who might have an interest in the effects of the deceased; guarding, therefore, as far as the forms of the Court can guard, against any imposition or attempt at imposition that might be made.

That application, however, did not become necessary; for probate, in the first instance, was stopped by the *caveat* entered by Mr. Jennings; and, secondly, by that entered on behalf of Mr. Thomas Helps and Mr. Thomas Wood by Mr. Pulley; and then another party, Mrs. Elizabeth Goodlake, appearing as the next of kin of the deceased, her interest being immediately admitted, it was deemed advisable that the executors should propound the

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At this time the only other parties before the Court were Mrs. Goodlake and the executors; the one opposing the will, the other propounding it. Mrs. Goodlake, as I have already stated, was considered not to be a very formidable opponent upon the part of the executors. Her interest was immediately admitted; and, looking at the proceedings in the cause, it is quite clear that, if the case had gone on as against her, no inconvenient interrogatories would have been addressed to the witnesses with regard to the plight and condition of the papers at the time when they were executed by the deceased, for the Court finds that not a single interrogatory has been addressed to any one witness on her behalf: and it is apparent that she was acting under the directions and with reference to the interests of the executors, because, by referring to the proxies which have been exhibited in this cause, the Court has every reason to believe that they are all from the same office; they are precisely similar so far as the Court is able to judge by reference to them; they are in a form not usual in this Court, and are headed "In the Prerogative Court of Canterbury;" the other proxies in the cause have no such heading, nor am I aware that it is usual to head the proxies exhibited in this Court by the name of the Court for whose use and in whose registry they are to be deposited; and, besides this, I observe that Mrs. Goodlake's affidavit as to Scripts is sworn in the presence of John Cox and John Surman Cox, of No. 2, Bath-street, Cheltenham, soli-

citors, which Mr. John Surnam Cox is proved by several of the witnesses in the cause to be the solicitor of Mr. John Surman, one of the executors and universal legatees named in the paper of the second of December. He also appears to have been present at meetings and consultations on behalf of the executors, all which proves, beyond possibility of a doubt, that Mrs. Goodlake is but a nominal party as opposing the interests of the executors.

This being the state in which the cause and proceedings were at this time, and with a nominal opponent, the executors propound these instruments. They bring in an allegation, propounding the papers (A) and (B) nearly in the form of a common *condidit*, so far as the circumstances of the case allowed, in effect pleading that the paper-writing of the second of December, described as "Instructions for the will of James Wood," was drawn up and reduced into writing, and was, after being so drawn up, read over and approved by the deceased; that in testimony whereof he signed his name thereto; that, on the third of December, he being then also of sound mind, memory, and understanding, and having a mind and intention to complete his said intended will, gave directions and instructions to that effect; that pursuant thereto, the paper-writing marked (B) was drawn up and reduced into writing, and that after the same was so drawn up and reduced into writing, the same was, to wit, on the third day of December, one thousand eight hundred and thirty-four, being the day of the date thereof, read over by the said deceased, who well knew and understood the contents thereof, and liked and approved of the same,

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and in testimony of such his good liking and approbation set and subscribed his name thereto.

So far, therefore, the factum of these two papers is alleged. The allegation then goes on to plead that he published and declared paper (B), together with the paper (A), to be his last will and testament, in the presence of three credible witnesses, whose names are thereto subscribed as attesting the execution thereof. It then pleaded, in the usual form, the capacity of the deceased.

The allegation further pleaded the subscription to the paper of the second of December, and to that of the third of December, to be in the proper handwriting and subscription of the deceased; and that after the death of the deceased, the paper-writings were found in his repositories, sealed up in an envelope, now in the registry of this Court, marked (C), annexed together in manner as now appears.

This then was the statement of the executors in their allegation; and all that was necessary to prove was the drawing up of the instructions and the signature to those instructions by the deceased, the drawing up of the paper of the third of December, the subscription to that, the execution of it in the presence of three witnesses, the annexing the papers together in the manner in which they now appear before the Court, and the finding of those papers so annexed together in the repositories of the deceased, sealed up in an envelope. Those were the necessary facts to be established, and if established by witnesses, if the executors had examined the three subscribing witnesses to the paper of the third of December, and if they had examined

Mr. Phillpotts and a second witness to the hand-writing of the deceased as to the paper of the second of December, and Mr. Phillpotts also to the finding of these papers in the condition in which they are represented by him in his affidavit to have been found, and to which it is probable he would have adhered when examined as a witness in the cause, and it being clear, from what has subsequently happened, that no interrogatories would have been addressed to the witnesses in the cause by way of elucidating the facts which might throw any doubt upon the integrity of the proceedings. Under these circumstances, it is quite impossible but that the Court must have pronounced for the validity of these papers as together containing the will of the deceased, notwithstanding one of them contained instructions and the other a regularly executed will.

It is clear that that must have been the course which this proceeding would have assumed ; but it did so happen, that before the cause arrived at its termination, and before the commission for the examination of witnesses had been completed, a paper was produced, which not only stopped the cause as between the executors and Mrs. Goodlake, their nominal opponent, but gave a different character to the whole case, and has been the occasion of these long proceedings, and the mass of evidence before the Court. The circumstances attending the production of this paper are stated in the affidavit of Mr. Helps ; whence it appears, that, on the eighth of June, he received by the threepenny-post a packet containing the paper-writing now propounded as a codicil ; that on the receipt of the paper, he immediately communicated it to the exe-

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cutors, and produced the original to them, and left a copy with them; that on the ninth, having endeavoured, with the assistance of Mr. Wilde, his solicitor, to obtain an interview with Mr. King, the solicitor of the executors, and Mr. Phillpotts, a counsel learned in the law, acting on behalf of the executors, it was not till the tenth that the interview took place; and that on the thirteenth of June, the codicil was brought into the registry of this Court, accompanied by an affidavit of Mr. Helps, stating the circumstances. There was also a pencil-writing accompanying this paper to this effect:

“The enclosed is a paper saved out of many burnt by parties I could hang. They pretend it is not J. Wood’s hand; many will swear to it. They want to swindle me. Let the rest know.”

This is not subscribed by any name, nor has the writer been discovered. The paper accompanying this writing is sworn to have been received in the same state as it is now before the Court, that is, torn, but not entirely through, but a part of the corner of the paper is burnt; and it has been argued from these circumstances, that, whether the paper be or be not a codicil, whether it be in the deceased’s handwriting or not, and whether subscribed by him or not, are points wholly unimportant, because it is a cancelled document; and that objection was stated at the time when the allegation propounding the paper was debated; but the Court was of opinion that the cancellation was not so clear as to prevent the parties from being permitted to propound the paper, more particularly as it is represented in the anonymous letter to have

been saved out of many burnt by parties the writer could hang ; and, therefore, if such were the case, it is evident that they could not have been destroyed by the deceased, but by some other persons who had an interest in destroying this paper.

The executors, on the appearance of this paper, were called upon to declare whether they would oppose it or not. They declared they would oppose it ; and it was then propounded by some of the legatees : and, in order to bind all parties by the sentence of this Court, the executors thought it right, not only to call on the parties interested in the codicil to propound it if they thought fit, but also to take out a decree, citing the next of kin to appear and see the proceedings to establish the two papers, as together containing the will of the deceased. On the decree being returned into Court, no appearance was given on behalf of any other next of kin, Mrs. Goodlake being already before the Court. The executors then reasserted the allegation previously given in as between themselves and Mrs. Goodlake, and repropounded the papers as together containing the will. Their allegation was readmitted in the same form and shape as in the first instance, so that they reasserted all that was contained in that allegation. Witnesses were produced, namely, the three subscribing witnesses, and two gentlemen (Messrs. Hitch and Higham), as to the handwriting of the deceased. Mr. Phillpotts, who had made an affidavit in the first instance, was not produced as a witness, as he was a party named in the codicil ; but his answers were called for and brought in ; and publication of the evidence was prayed on the fifth of November,

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one thousand eight hundred and thirty-six. An allegation was then asserted on behalf of the legatees in the codicil, which was admitted, with some slight reformatio. The purport of that allegation was to propound the codicil; to lay grounds of probability that it was the act of the testator; and, in order to remove the presumption against the paper, arising from the appearance of burning and tearing, it pleads circumstances, insinuating, if not charging in direct terms, misconduct and mal-practices on the part of the executors—that, among other things, they had been guilty of a spoliation of papers of a testamentary nature, and also (what appears the more immediate and direct object of the parties,) it pleads certain circumstances, with respect to the papers of the second and third of December, one thousand eight hundred and thirty-four, which go to show that the case set up by the executors is not a true case, as the papers were not originally annexed together as they now appear, nor were produced in that state to the witnesses, at the time of execution; and it also pleads that the papers had not been sealed up in their presence, and that they were not deposited in the envelope in the bureau, in which they were discovered on the twenty-first of April, with the privity, consent, and approbation of the deceased, or in the same plight and condition as when found; and that the annexing these papers together, and enclosing them in the envelope, were entirely unknown to the deceased. It goes on to allege that the papers had been deposited in the place where they were found a short time only before they were discovered, and that the bureau and repositories of the deceased

were accessible to different persons in the house; and it pleads that the deceased had executed other papers of a testamentary nature, which had been deposited by him in his bureau, and which had been abstracted from thence without his privity and consent; thereby laying a foundation for a suspicion, or a suggestion at least, that other papers might have been abstracted by persons in the deceased's house, or in his employment, or who visited there, without his privity; and it pleads, in order to show the facilities that existed for this purpose, that the deceased was careless of his keys.

These charges were, certainly, of a most serious kind, and, if true, would awaken the jealousy and suspicion of the Court, for they go to a direct falsification of the case set up by the executors; they impute to them the destruction of one or more testamentary papers of the deceased; and they insinuate that they, or some person with their privity, had attempted to destroy the codicil of July, one thousand eight hundred and thirty-five, which had been rescued by some person. These imputations, considering the parties against whom they were directed, appeared to the Court so highly improbable, I may say, almost incredible, that it was with the greatest astonishment I found it to be admitted, in the answers of those parties, that a great part, and a material part, was founded on fact; for it does appear that the two papers were not originally annexed together, when executed by the deceased; that they had not been in company together from the time they were executed, until the morning of the twentieth of April, the day on which the deceased died, at a time when it is admitted that

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he was utterly incapable of being spoken to upon any business whatever. It is also admitted, that the paper of the second of December, described as "Instructions for the Will of the deceased," had remained in the custody of Mr. Chadborn, the drawer of both papers, and one of the executors; and that it was only on that morning taken from his house, immediately on his arrival from London by the mail, placed in an envelope, wafered by him, and indorsed by him, in his own house, as containing the will of the deceased, bearing date second and third of December; the fact being, that at the time, the will of the third was in the repositories of the deceased, at his own house; where, if the parties are to be believed in the account they give in their answers, it had been from the time of its execution till the morning of the twentieth of April, with the exception of a few days, during which it had been in a tin box, in a closet of the room where the deceased carried on his banking business, and from whence it was removed into the bureau, where it remained till the morning of the twentieth of April, when it was removed from thence by Mr. Osborne, who took it to Mr. Chadborn; and, in the presence of the four executors, the envelope in which it had been enclosed by Mr. Chadborn, that morning, and wafered, was opened, and the paper of the third of December taken from the bureau, and attached to paper (A) of the second of December; the two papers being carefully wafered together, as now exhibited before the Court, and then carefully sealed up by Mr. Chadborn, in the same envelope which had been already indorsed by him before he arrived at the

deceased's house—showing what his intention was, namely, to enclose them in an envelope; and the papers being so enclosed and attached together, the envelope is sealed with a seal, bearing the impression of the deceased's initials; the papers are then replaced in the bureau, from whence paper (B) had been taken. And it is said that all this was done by them, under the advice and at the suggestion of Mr. Phillpotts, who was at that time acting, and continued for some time subsequently to act (till the discovery of the codicil), as the legal adviser of the executors.

The admission of these startling facts, (for that they are such must be acknowledged,) implicates not only the executors themselves, but Mr. Phillpotts, in the charge of having attempted to deceive the Court, and to obtain probate of these papers on a false representation of facts; for though the affidavit of Mr. Phillpotts does not expressly aver, that the papers were in the same plight and condition as when executed by the deceased, it is clear that the impression attempted to be conveyed to the mind of the Court was, that they were in the same plight and condition as at the time of execution; and that they were so placed with the privity, and knowledge, and approbation of the deceased. It is quite impossible to read that affidavit, and not to see that such was the impression meant to be conveyed.

I have already stated that, but for the mere accident of the production of the paper of one thousand eight hundred and thirty-five, this attempt would probably have been crowned with success; for nothing but the appearance of the codicil could have prevented it. If the subscribing wit-

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nesses had been produced, and Mr. Phillpotts had been examined to prove the finding of the papers in the state in which they were, no suspicion could have been raised in the mind of the Court as to the *bona fides* of the transaction. The real state of the facts could not have appeared, and the Court could have had no alternative but to pronounce for the validity of the instruments; and, under these circumstances, the Court feels very strongly that it has been unfairly and improperly treated by those who, in the first instance, set up a totally false case, and attempted to surprise it into pronouncing for these papers as together containing the will of the deceased, by a misrepresentation of facts, and by setting forth a false statement of circumstances, in order to procure probate of the papers in common form.

But the case is much stronger against the instructions, when it is found that there was a will executed on the following day; for nothing can be more clear, according to all the doctrines and principles of this Court, than that a paper of instructions, or a draught, though signed by the deceased, is superseded and done away with by the execution of a will; that it is contrary to the practice of the Court to pronounce for instructions, as part of a will executed after the date of the instructions, though, under certain circumstances, it is competent to the Court to permit omissions, which may have occurred through inadvertence, negligence or mistake, to be supplied by showing that, notwithstanding the will itself contains a complete disposition of the property, and does not present any ambiguity on the face of it; yet there are some

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omissions, some legacy, or residuary clause, not inserted. But the Court has always required that, in order to supply the deficiency in the executed instrument, it should not depend upon parol evidence, but be established by written documents. I am not aware of any case in which the Court has permitted a paper of instructions to be annexed to a regularly executed paper, the paper of instructions bearing date before the execution of the will.

It was stated in the argument, that cases have occurred in which the Court has pronounced for twenty papers as together containing the will of the deceased; but that has been only where the papers contain a partial disposition; neither being intended to be a complete will, and neither revoking the other. If it had been alleged in this case, that it was through error and mistake that the names of the executors had been omitted in the second paper, the Court, if it had full and satisfactory evidence on this point, might have permitted the omission to be supplied, by inserting the names of the executors, as they stand in the paper of the second of December, in that of the third. But the Court could not have done so without a perfect satisfaction that it was carrying into effect the real intentions of the deceased. And whence could the Court obtain this information? Only from the person who himself knew what passed at the time namely, Mr. Chadborn; for he as the deceased's confidential solicitor, was employed by him to draw up these two instruments, under which he is to take so large a benefit, to the amount of two or three hundred thousand pounds. But this is not the case set up, the case set up is, not that there has been

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omissions, some legacy, or residuary clause, not inserted. But the Court has always required that, in order to supply the deficiency in the executed instrument, it should not depend upon parol evidence, but be established by written documents. I am not aware of any case in which the Court has permitted a paper of instructions to be annexed to a regularly executed paper, the paper of instructions bearing date before the execution of the will.

It was stated in the argument, that cases have occurred in which the Court has pronounced for twenty papers as together containing the will of the deceased; but that has been only where the papers contain a partial disposition; neither being intended to be a complete will, and neither revoking the other. If it had been alleged in this case, that it was through error and mistake that the names of the executors had been omitted in the second paper, the Court, if it had full and satisfactory evidence on this point, might have permitted the omission to be supplied, by inserting the names of the executors, as they stand in the paper of the second of December, in that of the third. But the Court could not have done so without a perfect satisfaction that it was carrying into effect the real intentions of the deceased. And whence could the Court obtain this information? Only from the person who himself knew what passed at the time namely, Mr. Chadborn; for he as the deceased's confidential solicitor, was employed by him to draw up these two instruments, under which he is to take so large a benefit, to the amount of two or three hundred thousand pounds. But this is not the case set up, the case set up is, not that there has been

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any omission, but that it was the intention of the deceased to give effect to these papers as they stand, by incorporating both together, as containing his will. There was, therefore, no surprise upon the deceased, or upon Mr. Chadborn, or upon any person cognizant of the preparation and execution of the two instruments. Under these circumstances, nothing but the clearest and most unequivocal evidence that the paper of instructions was intended by the deceased to form part of his will, could justify the Court in pronouncing for it, in conjunction with the will; and unless the witnesses examined to prove the execution of the paper do prove that the deceased did publish the two papers as together containing his will, it is quite impossible for the Court to pronounce for the validity of the paper of the second December, entitled "Instructions."

It was asked, in the argument, what possible purpose of fraud could be answered by annexing these two papers together; because, at the time they were first brought forward, there was no dispute as to their validity? The answer is, that that is the very reason why the annexation was to be made, to prevent opposition; for it is quite impossible, if the facts were as stated in the allegation of the executors, that any party would raise an opposition that must have been fruitless, unless he could show that the representation of facts in the affidavit of Mr. Phillpotts, and the appearance of the paper, were false and untrue; it would have been utterly useless, therefore, to have entered into an opposition against the papers, and probate would have passed almost as a matter of course, on the examination of the

witnesses upon the *condidit*: for there was no doubt as to the capacity of the deceased, and the papers were stated to have been found in his repositories.

It has been said that Mr. Phillpotts's affidavit might have been incautious; that it was a mere formal act, and that no care or attention was used in drawing it. I am of a different opinion. I consider that it was drawn with much care and attention, and I consider it a most important affidavit, and one best calculated to carry into effect the avowed intention of the parties; that is, to obtain probate of the papers in common form. If Mr. Phillpotts was cognizant of all the facts disclosed in the answers of the parties, and if, with a knowledge of this state of facts, he advised that the two papers should be attached together and deposited in the bureau where they were to be found by him on a subsequent day, and if he knew the facts as stated by Mr. Chadborn in his answer, I am very much afraid that the plea of incautious swearing would not exonerate him from a serious imputation. The terms of the affidavit are calculated to insure the passing of the probate in common form, and no person skilled in the proceedings of this Court could have framed an affidavit better adapted to secure the object. I cannot, therefore, admit the plea of want of caution, if Mr. Phillpotts was cognizant of what passed; but as the fact of that gentleman's knowledge entirely depends upon the answer of Mr. Chadborn and the other executors, looking at the conduct of these parties, it would be too much to hold that Mr. Phillpotts is proved to have advised the parties to act in the manner sug-

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gested. I think, Mr. Phillpotts could not have been cognizant of what was done; that he must have advised them in ignorance of the real state of the facts, and, considering that Mr. Chadborn himself is a solicitor of long standing, having practised in Gloucester for twenty-five years, and having been the confidential solicitor of the deceased, it could be hardly necessary for him to have had recourse to Mr. Phillpotts for advice, as to what he should do with these two papers, in the situation in which they are stated to have been up to the morning of the 20th of April, 1836; and I, therefore, do not feel myself called upon to say that, in my apprehension, there is any charge proved against Mr. Phillpotts of having made this affidavit with a knowledge of the circumstances which actually took place, as to the mode in which the papers were annexed together, and sealed up in the envelope, and deposited in the bureau. The utmost extent to which, on the answers of the executors, Mr. Phillpotts can be considered implicated in the transaction, is, that, in the morning of the 20th of April, or the night of the 19th during their journey from London, Mr. Chadborn might have communicated to him that he had a paper in his possession which formed part of the deceased's will, the other part being in the deceased's possession, and he might have thrown out, "if they are to form parts of the deceased's will, they ought to be together;" that is the utmost extent to which, on the face of the answers, I can consider any charge proved against Mr. Phillpotts—a suggestion thrown out without a knowledge of the real state of the facts, but acted on by Mr. Chadborn, in the presence, if not with the sanction, of all the other executors.

As far as Mr. Chadborn is concerned, he at all events knew all the facts; he knew that the paper of the 2d of December was in his own possession, and that that of the 3d was in the possession of the deceased; he knew that the papers had never been annexed together; he knew (his own conduct shows that he did,) that there was a necessity for the two papers being annexed together in such a form as to show that they were parts of the will of the deceased. He accordingly proceeds to the deceased's house, on the morning of the 20th of April, knowing that the deceased was extremely ill, if not in great danger. On his arrival at his own house, he had taken the paper of the 2nd of December from his own writing-desk, and enclosed it, as he states, in a sheet of paper; he wafers that paper up; he indorses it at his own house (as he states in his answer), as "the will of James Wood, Esq., 2nd and 3rd Dec. 1834;" having arrived at the deceased's house, and having ascertained (as stated in his answer) that the deceased was in a state in which he was not capable of being communicated with on any matter of business, he desires Mr. Osborne to fetch down the paper of the 3rd of December, from the bureau in which he had deposited it, and, having done so, he opens the envelope, in which the paper of the 2d of December was enclosed, and annexes (as he expressly states) the two papers together, places them in the envelope, and seals them with the deceased's seal, which, he says, accidentally lay there, a candle being upon the table, and then it is that the papers are deposited in the bureau.

Now, was Mr. Osborne or Mr. Surman im-

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plicated in this transaction? Mr. Osborne is the person by whom (as stated in the answers) the paper of the 3rd of December had been removed from the box in which it had been deposited, after execution, by Mr. Surman, and he, therefore, knew that paper (B) was not at that time annexed to paper (A.) He also knew that, at that time, they were not enclosed in an envelope; and he also knew that, on the morning of the 20th of April, all this took place, for it was his hand that removed the packet from the bureau where he had deposited it. Mr. Surman had deposited the paper (so he swears) in a tin box, in a closet, in the parlour of the deceased, where he kept the current cash and notes; and he must, therefore, have been aware that the paper, at that time, was not enclosed in an envelope, and that it was not connected with the other paper of the 2nd of December; and, therefore, when he saw, on the morning of the 21st of April, the packet broken open, and containing the two papers, he knew that they were not in the same plight and condition as when deposited by himself and Mr. Osborne; and his first inquiry would naturally be, "How came this change to take place in the condition of the papers?"

With regard to the fourth executor, he does not appear to have been cognizant of the principal part of the proceedings (so far as we may presume from his answers) which took place. He says he understands now that what is represented by the other executors did take place in his presence; but he expressly swears, that, being otherwise occupied, he was totally ignorant of it; that he knew nothing of it till the allegation of the executors was given

in ; that, as far as the paper of the 3rd of December is concerned, he was not aware of it, and never inspected or read it till it was taken out of the envelope on the 21st of April, 1836. Whether he knew till then that there was such a paper as that of the 2nd of December, does not appear. Now, it may possibly be that this gentleman (the fourth executor) was ignorant of what did take place ; but whether ignorant or cognizant of the proceedings, and, however, morally acquitted of the guilt of assisting or participating in this fraud, he must be legally responsible for the acts of the other executors. I must, therefore, hold that all the executors were (for the purpose of this question) cognizant of what took place, and that all are bound by the consequences of their conduct, be they what they may.

The result then of this part of the case is, that the papers were not annexed together with the knowledge of the deceased. Now, what effect ought this conduct to have on the mind of the court? I have dwelt longer upon this stage of the proceedings, because I think it is that upon which the whole of this case must eventually turn. The effect which it ought to produce upon the mind of the Court is to place it on its guard, at least, against receiving explanations from parties who have conducted themselves in this manner, for that which I must consider to have been an object of advantage to themselves. For though it be true, that Mr. Chadborn swears, and the other executors swear that they believe what he states to be true, that he had no improper motive in annexing together the two papers and placing them in the enve-

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lope ; “on the contrary, that he took therein the course which at the time he believed the fittest and properest course under the circumstances to be taken, in respect to the said two papers ;” the Court cannot but feel convinced that it was to facilitate the obtaining probate of these papers, and thereby to put himself into the possession of the property of the deceased, on a false representation of facts, which the Court had no means whatever of detecting ; and so far from this being a case in which the Court ought to presume anything in favour of the executors, it is precisely a case in which it ought to presume everything against them ; for it is not one of those cases which are of common occurrence, where a party draws up an instrument which confers an advantage upon himself : for here the Court is called upon to pronounce for the validity of a paper which is not signed in the presence of witnesses, which is drawn up by a solicitor who is one of the executors, and where the Court can have no information but what comes from him.

The state and condition of these papers, subject to the observations of the Court, as to the conduct of the executors, must be considered as that in which they were on the nineteenth of April, before they were annexed together by Mr. Chadborn ; and the question is, whether the evidence is sufficient to satisfy the Court, that the papers were intended to form together the will of the deceased ? for, notwithstanding the conduct of the executors, it is still competent to them to prove, that, at the time of execution, they were published by the deceased, as together containing his will ; and, therefore, that

the presumption of law, that by the execution of the latter instrument, the former was superseded, is rebutted.

What is the character of the paper of the 2nd of December? It merely purports to be instructions for a will, as far as relates to personal property only, and as to the appointment of executors. But the paper of the third disposes of both the real and the personal estate, and therefore embodies within itself the contents of the paper of the former day, with a certain variation, which I have referred to, as to the mode in which the executors were to take the property; and, therefore, it must be considered, *prima facie*, as a revocation of the instructions, the effect of which (after they had performed their duty) was at an end. It is true, that the paper of the 3rd of December is utterly useless by itself, and it has been contended that, therefore, it never could have been intended to supersede the former. But I do not agree in this conclusion. In the first place, there is a difference between the two papers, as to the manner in which the executors are to take the property; and the latter paper disposes of the personal property, which had been disposed of by the former, and, *prima facie*, therefore, it could not have been the intention of the deceased that the two papers should operate together; and though paper (B) can have no effect by itself, it by no means follows that it was the deceased's intention that the other should have effect as a part of his testamentary disposition; that must be proved by other circumstances, than what appears upon the paper itself. I do not think that what appears in the latter paper, "I declare this to be my Will for

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disposing of my estates, as directed by my Instructions," necessarily refers to the paper of the 2d of December only; for, under the circumstances, it is quite impossible for the Court to know what may have taken place between the deceased and Mr. Chadborn, and it is no necessary consequence that, by "my Instructions," he meant "my Instructions which I gave the preceding day to Mr. Chadborn, for drawing my will." But supposing it to be so, and that paper (A) is referred to, it was superseded by the execution of the will, and it shows that the deceased considered the first paper as instructions and nothing more; and, looking to the character of the deceased, it appears that he had great difficulty in making up his mind as to the disposition of his property. Mr. Horner (who had been clerk to Mr. Chadborn) states that in 1831, 1832, and 1833, he consulted him frequently about making his will, when he talked of giving such and such things to particular individuals; but that he concluded with saying, "I have so much to dispose of, that I do not know what to do with it." And I am not prepared to say, from the evidence, that the deceased was not of that vacillating disposition, as to render it probable that he should alter his mind in this respect from day to day; and looking at the papers themselves, which are most extraordinary papers to come out of the hands of a professional gentleman, to dispose of property of such an amount, it appears not improbable that they were written for a temporary purpose, to satisfy persons who had deposited cash in his banking-house, that after his death there would be no difficulty in receiving such portions of their property as re-

mained in his hands, as he had made a will and appointed exécutors; and that he might have departed one day from the intentions he expressed at another.

I now proceed to the evidence in support of the instruments. With respect to the first paper, dated the 2nd of December, there is no evidence whatever as to the time when it was written, further than appears on the face of it; nor is there any direct evidence from persons present, that the signature is that of the deceased. There is the evidence of two persons, who depose to their belief that the signature is in the handwriting of the deceased; but as these witnesses, when examined, had no reason to suppose that these papers had not come out of the repositories of the deceased united together, no suspicion was raised in their minds, and it may be doubtful, after what has taken place, whether such proof ought to be accepted as sufficient evidence alone of the authentication of this paper, as in the deceased's handwriting; because, though there has been no attack made upon the genuineness of this signature, either in plea or interrogatory, enough, I think, appears in evidence to show that some doubt may exist as to its being the signature of the deceased; for it does appear, from the evidence of several persons, that this signature is less like the deceased's usual mode of signing than that in the paper propounded as a codicil, and which is alleged to be a forgery. This point is the more important, because on this paper depends the whole interest of the executors; for their names do not appear in the other paper, which is a will regularly executed and attested.

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All the circumstances of the case were in the knowledge of Mr. Chadborn (though he did not think fit to disclose them), and he knew that that the test usually applied where the validity of a paper depends upon handwriting,—that the paper was found in the repositories of the deceased, and therefore was *prima facie* placed there by him, or with his knowledge,—could not have availed: and, therefore, he ought to have been particularly careful to have produced the most full and satisfactory evidence of the execution of the paper, for there is no direct recognition of it, and the whole depends upon the evidence as to the signature being that of the deceased.

The three witnesses, examined on the *condidit*, are the attesting witnesses, one being a clerk to Mr. Chadborn, another, his coachman, and the third, (*Lewis*,) a person resident in the deceased's house, being an old servant of his sister's: not exactly the class of witnesses the Court would have expected to find attesting a document like this, conveying so large a benefit. These witnesses state the circumstances under which the execution took place: that between eight and nine o'clock at night, of the 3rd of December, the deceased, who had a cold, sent *Ann Lewis* to Mr. Chadborn's office, to desire that he would come to him on business he wished to complete that night; whence it has been argued, that something had been begun, which he wished to finish; and that this must have been the will, for which he had given instructions the preceding day. But, assuming this to be the case, it only proves that that which was to be completed, was his will—not that he intended those instructions to

form part of his will. *Lewis* went to Mr. Chadborn, who had a party to dinner, and on receiving the message he proceeded to the deceased's house. The general result of the evidence of the subscribing witnesses is, that when they went to the deceased's room, they found him and Mr. Chadborn together, the latter (it should seem) being employed to write the attestation clause. It does not appear that either of the witnesses heard any part of the will read, or that anything passed between the deceased and Mr. Chadborn, as to the instructions; they all concur in stating, that when they went into the room, the deceased appeared to read the paper twice over; that some conversation took place between him and Mr. Chadborn, as to a power of altering the will, and being satisfied by Mr. Chadborn's pointing out the clause in the will to that effect, that he had such power, he signed his name, and declared he published this as his will, in the presence of the witnesses, who attested the execution, and then left the room. They know nothing of what passed as to the custody of the will, or the place of its deposit. But they say nothing in their depositions in chief as to paper (A), or as to any other paper being before him at the time; and, as I have before remarked, if the paper of July, 1835, had not made its appearance, nothing would have appeared in the evidence of these witnesses beyond what they state in their depositions in chief; for not a single interrogatory would have been addressed to them by Mrs. Goodlake, the only other party before the Court when the allegation was first given in. The evidence might have

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appeared equivocal, seeing that there were two papers; yet, looking at Mr. Phillpott's affidavit, as to the plight and condition and finding of the papers, the Court, on this evidence, would have had no hesitation in pronouncing for their validity. But when the legatees in the codicil came before the Court, they administered interrogatories to the witnesses on the *condidit*; though a good deal of difficulty was made as to the right of the legatees to administer such interrogatories, as it was said they had no interest in invalidating the will, their interest being confined to the codicil: this was true, but still the legatees had an interest in showing that, under the circumstances in which the will was executed, it was unlikely that the deceased would have adhered to a disposition which gave his entire property to the persons named as executors in the first paper; so little connected with him by relationship; and that he might very probably have given large sums to other individuals. But so it was—the right of the legatees to interrogate these witnesses was objected to: whether from a misgiving or suspicion, on the part of the executors, that the witnesses would not stand the test of cross-examination by those who had an interest in disclosing the conduct that had been pursued, though they had, perhaps, only a glimmering of light; yet from that glimmering of light, something might be elicited which would have the effect of showing that the conduct of the executors with respect to these papers had not been what it ought to have been. But it was not a mere common objection to the cross-examination of these witnesses; an act on

petition was entered into, and when the commission issued, it was prayed that the commissioner might be named by the executors only. The objection was afterwards waived by the proctor for the executors, and the interrogatories were administered, though, instead of executing the commission at Gloucester, the witnesses were brought up to London to be examined.

Now, the witness *Swann*, in answer to the interrogatories, with respect to the paper (A), (of the 2d of December) states that it is in Mr. Chadborn's handwriting; the signature he believes to be Mr. Wood's. He never, to his knowledge, saw the paper before—the allegation on which he was examined expressly pleading that the deceased published that paper, together with paper (B), as his will, in the presence of this witness; so that the paper must have been before him at the time that his attention was called to it, and that he published it as part of his will; whereas this witness expressly swears that the deceased did not, and that he had never seen the paper, as he believes, till the time of his examination. And, in answer to another interrogatory, he swears, “there were many other papers lying on the table at the time, but I did not observe any other written paper; there was not any other paper produced, certainly.” He has, therefore, as far as his evidence goes, negatived on interrogatory the plea of the executors which he was called upon to prove, namely, that the paper was published by the deceased as part of his will. *Veale*, the coachman of Mr. Chadborn, says, on interrogatory, that he never saw the paper (A) before, nor knew anything concerning it; that he

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did not notice that any other papers were produced at the time Mr. Wood signed his will: he, therefore, negatives the plea, as far as his observation went. *Ann Lewis* states, that she never saw the paper (A) before, to her knowledge; that all she knows is, that the paper (B) was lying on the table written when she entered the room, and that she saw Mr. Wood sign it: she says, "I cannot say whether there might not be some written paper upon the table at the time the will was signed; but I did not observe any other than the will."

If any witnesses can negative the important fact pleaded by the executors, of the publication of the two papers as together containing the will, these are the precise witnesses for the purpose, for they state, one and all, that there was no other paper they knew of but that which was signed and attested by them; and we now know for certain that they could not, at that time, have been annexed together as they now are.

But it is said that, as the witnesses have declined to go to the full extent of the plea, the Court may be secure in believing that theirs is a true account, and that they have not been tampered with by Mr. Chadborn; and I am inclined to believe that it is a true account, and that the paper (B) would, if it stood alone, be entitled to probate. But with respect to the paper (A), not a single syllable comes from them as to the existence of that paper; and therefore I do not believe that the witnesses have been tampered with, or if tampered with, that it has been successful. Their evidence goes to negative the publication of both papers, and, therefore, the paper (A) does not appear, from anything that

has yet occurred, to have been a part of the deceased's will at that time, or to have been intended to have any effect or operation whatever.

But it is said, that the paper (A) must have been present at the time with the deceased, because paper (B) conveys, by itself, no interest to any person whatever. But that affords no direct presumption that the other paper was present at that time. On the contrary, the presumption is that it was not there. Mr. Chadborn came from his dinner-party in a hurry, and it is not probable that he brought the paper of instructions in his pocket. But on the face of the paper (B) itself there is no corroboration of the suggestion that the other paper was present; for the words are all in the singular number—there is no reference to a plurality of papers: “I do declare *this* to be my will,” not “this paper and the paper I gave to Mr. Chadborn yesterday.” And “in witness whereof I have to *this* my last will set my hand,” &c. Therefore, as far as the contents of the paper itself go, the presumption in my mind is strong, that paper (A) was not present when paper (B) was executed by the deceased.

But there is another circumstance arising out of the former part of the case. What would have been the conduct of the parties if the papers had been together? For what possible reason should they have been separated? Why should they have been deposited in different places? The only suggestion I have heard is, that the deceased might not choose to have his papers deposited in places where other persons had access, and who would see who were to have his property. But what was to

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prevent Mr. Wood from telling Mr. Chadborn, his confidential solicitor, to seal up the two papers together in an envelope? But from whom are these papers to be concealed? Who are the persons who had access to his repositories and could ascertain his testamentary disposition? No persons but Mr. Osborne and Mr. Surman, who are described as having been present at the time, and the others as having been in and out of the room, and they heard the deceased declare who were to be his universal legatees and devisees. There was, therefore, no secret to be kept from them; and the whole tenor of the case of the executors is, that the deceased was constantly declaring that those were the persons to whom his property was to go, recognizing them over and over again (some of them to one person and some to another) as the persons who were to take his property after his death; and, therefore, the suggestion entirely fails to satisfy my mind; and I have no other evidence but the answers, and I cannot take the explanations given by parties who are so deeply interested, and who have so conducted themselves, against the evidence of persons called to prove, what they have negatived, that the deceased executed these papers and published them as together containing his will.

The evidence of these witnesses (with that of the two witnesses to the handwriting) is all the direct proof we have as to either of the two papers; and as this direct evidence fails to establish the fact that the two papers were intended to operate together, recourse is had to another species of proof; and what is that? Why, that the disposition contained in the papers is extremely probable, considering the

persons to whom the property is given, Sir Matthew Wood, Mr. Chadborn, Mr. Osborne, and Mr. Surman. The three first are not in any degree related to the deceased; the fourth is a second cousin once removed, being the son of Mrs. Goodlake, having changed his name, so that he is a distant relation. It is true that Alderman Wood appears to have been a very intimate friend of the deceased, and that the deceased had a great regard and affection for him. The origin of their acquaintance was a political event which occurred in 1820, in which Mr. Alderman Wood took a very conspicuous part, which introduced him to the acquaintance of the deceased's sister, under whose will, I believe, he acquired a house in Gloucester. On going down to attend the sister's funeral, in 1824, he was introduced to the deceased, and a degree of intimacy took place between these persons, which would render it extremely probable that a very considerable proportion of the deceased's property would have been given to Mr. Alderman Wood. A bequest of two hundred and fifty thousand pounds is not so improbable as to lay any ground of suspicion, if the act is brought home to the testator. Mr. Wood, in 1831 or 1832, accepted the Alderman as a tenant of a house at Hatherley, or he suffered him to occupy it without paying rent. The deceased had also been a trustee for his daughter, on her marriage with Dr. Maddy, of Gloucester, and stood godfather to the children of the marriage; so that there was a friendship between them, which subsisted down to the latest period of the deceased's life. On the passing of the Reform Bill, he wrote to Lord John Russell,

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describing Alderman Wood as his “esteemed friend,” and praying that he might be appointed a magistrate under the Reform Act. These are all circumstances from which it is apparent that the deceased did entertain a sincere regard for Alderman Wood, which is corroborated by the evidence of several witnesses in the cause; and a witness produced by the legatees states, that he should have thought it extremely odd if Alderman Wood had not had a considerable part of the deceased’s property.

With respect to Mr. Chadborn, too, nothing could be more probable than that the deceased would have appointed him an executor. He had been his confidential solicitor for many years, and had had for some years the management of his whole estates in the country; and it is in evidence, that the deceased declared, on several occasions, that Mr. Chadborn had given his services gratuitously, and that he would “put him in a corner of his will;” that “everything would be his Honour’s;” that “his Honour would be a great man one day;” so that nothing was more probable than that Mr. Chadborn would be a legatee in his will. But it does not appear that the benevolent feelings of the deceased towards Mr. Chadborn were founded upon very solid grounds; for, though he did not make out any bill of charges against the deceased, the deceased was allowed to believe that he was acting disinterestedly, doing all as a friend, without making any charge (though on some occasions he did receive some small fees, on law accounts), yet it does appear from his books (which were produced with considerable reluctance), that he kept regular

entries of his attendance on and services for the deceased, and thus had all the materials for making out a bill; and it does appear that Mr. Chadborn has claimed to set-off against certain advances, a charge for legal services rendered to the deceased, to the amount of between two and three thousand pounds. But the deceased was ignorant of this fact; he believed that all was done out of friendship for him, and these are grounds which rendered it probable that Mr. Chadborn would have a large portion of his property.

With respect to Mr. Osborne, nothing could be more natural than that the deceased should make a large provision for him, from the time he had been with him in business, between thirty and forty years; and the deceased had always spoken highly of him: and he also declared that he would make a handsome provision for him, and on one occasion said that he deemed it his duty to provide for him.

Mr. Surman stands in one respect upon superior ground, as he was related to the deceased. At his death his apprenticeship had not expired; but he had been some years in the employ of the deceased, who declared that he had a regard and affection for him, and intended to benefit him.

With regard to these four individuals, therefore, nothing could be more natural than that the deceased should have left them a large share of his property; and if he had executed a will carrying that intention into effect, and had made no codicil, diminishing their interest, there would have been nothing to render the disposition improbable; though it would have been somewhat extraordinary if he had excluded other persons with whom he was

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also on terms of intimacy. But these are general grounds of probability—they go no further; they go no way to set up paper (A) as part of the will. They are circumstances leading to the *probability* of the disposition, but not to the *act* of disposition. There must be something more to show that paper (A) was intended to form a part of the deceased's testamentary papers.

Now several declarations have been pleaded to have been made by the deceased, both before and after the execution of this paper; those which were made before, as leading up to the probable execution of it; those which were made afterwards, for the purpose of showing a direct recognition of the instrument itself to be collected from those declarations, from a reference to the contents of this paper to which, and to which alone, it would allude.

Several witnesses have been produced in support of these different declarations; and, I may generally observe, that not one of them goes to the admission of the paper itself as an existing paper; there is a mere reference to circumstances which seem to connect themselves with the paper, but have no direct reference to the existence of any such paper, as made by the deceased himself. The witnesses who have been examined in support of these declarations are, first, *Mary Williams*, who deposes, upon the 17th Article of the allegation, that in a conversation which she had with the deceased at Michaelmas, 1832, with respect to some property which she occupied under the deceased, and had underlet to another tenant who refused to give up possession of it, that having consulted with the de-

ceased as to what was to be done, and the deceased having advised her to go to Mr. Chadborn, she said she had no money to go to law, he said, "Never mind, go to Mr. Chadborn; do you think a man will not take care of his own?" and it was argued from this that it shows an intention on his part to give part of his property to Mr. Chadborn, and as connected with other declarations, that he meant either to give the whole to Mr. Chadborn, or to give it to him conjointly with other persons.

There is another declaration, spoken to by this witness on the 10th Article, as occurring at Christmas, 1835, in which the deceased told her that Mr. Alderman Wood would have a part of his property, and upon the 13th, in which she speaks to Mr. Chadborn's intimacy with him, and having conducted his business, she says, that from the expressions he made use of to her she thought that Mr. Chadborn would have the whole of his property after his death, and that no person was to share with him.

Again in February, 1836, she says, that in a conversation with the deceased upon the probability of her continuing to occupy the house in which she resided, having held out as an inducement to her to repair it at her own expense (for it appears that the deceased was very much in the habit of encouraging the tenants to do repairs by the idea that they would be continued as tenants, or that they might succeed to it themselves), he said to her, "Never mind, if I do not live, my friend Chadborn and the Alderman will never turn you out." This is said to be a clear recognition of this paper, that

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Mr. Chadborn and the Alderman, who are two of the devisees, would not turn her out.

Another recognition spoken to by this witness is, that on the 16th of April, 1836, the day before he was taken ill, he said to her that his friend Chadborn and the Alderman would have the main of his property and the management of all of it after his death. I have already stated that two others, of the four who were appointed executors, Mr. Osborne and Mr. Surman, would have as much the management of his property as Mr. Alderman Wood and Mr. Chadborn would have had.

To the 26th interrogatory, she says that he said a year or two before he died, "My farm is as good as yours; you will never be turned out." "I did sometimes fancy that he would leave us the farm;" and that seems to have been a very prevalent notion of some of the tenants, and to have had a good deal of currency in the city of Gloucester, that it was the intention of the deceased to give his farms to the tenants by whom they were occupied; and yet she says, in answer to one of the interrogatories, that she supposed that everything would be Mr. Chadborn's after his death; and she says that two or three times afterwards he said that his friend Chadborn and Alderman Wood would have the main of his property, and that he never named any one else as intended to be benefited by him.

That is the evidence of the witness *Mary Williams*, as to those declarations. None of them go to a recognition of the paper as an existing paper, and none of them go directly to the contents, because they only speak of Mr. Alderman Wood

and Mr. Chadborn, either separately or together, inheriting the main of his property, which property, according to paper (A), would be taken in the same proportions by Mr. Osborne and Mr. Surman.

Mary Davis, another tenant of the deceased, says, upon the 13th Article of the allegation, that he never in express terms said to her who were to be his executors, nor, except upon one occasion, did he say to whom he intended to leave his property.

Upon the 14th and 15th she speaks to the great regard which he had for Mr. Surman and Mr. Osborne, and upon one occasion, namely, in the month of April, 1833, which was before the will bears date, and which, therefore, is not a recognition but only a circumstance of probability to lead to the inference that such a paper would be made; she states, that after Alderman Wood had become the occupier of the house at Hatherley, which was in the early part of 1833, she had a conversation with the deceased upon the subject of her rent, and upon that day she paid him forty pounds as part of what was due to him. The conversation that took place is this: he said that the Alderman would make me a very good landlord and a good neighbour, and would do a great deal of good in the parish. Now the effect of that is simply this, that Mr. Alderman Wood would make her a good landlord. A good landlord of what? Why of that farm which she occupied at Hatherley, being part of that property on which the deceased permitted the Alderman to live, either rent-free or occupying it as his tenant. This would only lead to the supposition that it was extremely probable that the deceased would, by his will, leave that part of his

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estate to Mr. Alderman Wood, but it goes no farther than that; it cannot have any reference to the general devise afterwards made of this property, because there is no more reason why Hatherley, under those circumstances, should be the property of Mr. Alderman Wood than that it should have belonged to Mr. Chadborn, or to Mr. Osborne, or to Mr. Surman. But he goes on to say in that conversation, that he would leave something handsome to Mr. Surman; and then there is a conversation as to some charities, in which he said that he would never leave anything to charities. He said, "That is exactly what my father said, I will never leave anything to charities."

So much for that conversation. But she also goes on to depose to a conversation which she had with him in February, in the year 1835, in which he said, upon some reference to him upon the subject of the farm which she occupied, that he had given up the management of his affairs to Mr. Chadborn. It appears upon the face of these proceedings, that in the latter part of his life he had not paid so much attention to the management of his property as he was accustomed in the early part of his life to bestow. He said, "That he had given up the management of his affairs to Mr. Chadborn, and as Mr. Chadborn would have the greater part of his property after his, the deceased's, death, Mr. Chadborn must do as he pleases about it." Now supposing the witness is precisely accurate in her recollection of what did pass upon this occasion, it would only show that the deceased had given to Mr. Chadborn the greater part of his property after his death. Whether he said "a great part" of his

property, or "the greater part," may be a matter of some question or some doubt, but it is perfectly immaterial, because it does not go to recognize the existence of a paper, or of the precise contents of that paper; for Mr. Chadborn has no more part of that property, under the paper of instructions, than the other legatees would have under it.

This witness is asked by an interrogatory, whether she had ever mentioned this circumstance, and to whom and when she had mentioned it. She says, that about twelve months ago, that is, before the time of her examination, she had, after the deceased's death, mentioned the conversation to Mr. Kendall (Mr. Kendall was employed after the deceased's death as an accountant, to manage the property of the deceased); and she says, "When I got home I set about recollecting, and I got my daughter to write it down." And a fortnight afterwards she gave the paper written by her daughter to Sir Matthew Wood. That the witness should have taken upon herself to recollect all that passed between herself and Mr. Wood twelve months after his death (this taking place in the month of February, 1835), appears somewhat extraordinary. I think it is too much to suppose that any great reliance can be placed either upon the accuracy of this witness's recollection in stating the terms in which the conversation passed, nor do I think that we are bound to suppose that the deceased was perfectly sincere in those declarations of his intentions at the time he made them.

She says, in answer to the 26th interrogatory, that "The deceased has several times said to me, speaking of my farm, it will be yours by and by;

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but I never heeded it, because I knew that he only said so to get his repairs done at my expense." Now he may most undoubtedly have endeavoured to impress her with the notion that she would have the property. He had, as is stated by many of the witnesses, a great deal of low cunning, and was anxious to save and to have everything done for him free of expense. He wished to get the repairs done at the expense of his tenants, and in order to induce them to lay out their own money, he intimated to them that probably the property would be theirs after his death; either that they would never be turned out by the executors, or that the farm would be theirs; and, therefore, it is quite impossible not to see that this gentleman was extremely insincere in the declarations he made, and that he had a purpose of his own to be answered by suffering his friends to believe that they were to have a great part of his property. It shows that the Court can place very little reliance upon declarations that come from such a testator as this.

Another witness, *Elizabeth Timbrell*, who is the daughter of one of the former witnesses, says, upon the 29th Article, that on the 11th of July, 1835 (the very month in which the codicil is dated), she had a conversation with the deceased, and that she paid upon that occasion thirty pounds rent due to Mr. Chadborn, and she inquired of the deceased whether she had done right in so doing, and that he told her that she had; that Mr. Chadborn, not Mr. Alderman Wood, and Mr. Osborne and Mr. Surman, but Mr. Chadborn, will be your brother's landlord after a bit; that is produced as a recognition of the disposition contained in these papers.

Now, if in these papers he had given that part of his property to Mr. Chadborn, this declaration would lead to a probability that he should have done so ; but in these papers there is nothing said about this Drew's farm, in the parish of Bulley, as being given to Mr. Chadborn, more than any other part of the property of the deceased. Therefore his saying that Mr. Chadborn would be her landlord after his death, proves nothing as to the disposition of the property contained in these papers of the second and third of December.

But she deposes, upon the thirty-first article, to a circumstance that occurred at the funeral of her husband. This lady is thirty-five or thirty-six years of age, and married an old man, who died at about the age of eighty-eight, and upon that occasion the deceased attended the funeral and conducted it. He kept a small haberdasher's shop with a bank attached to it, and he was in the habit of attending to conduct the funerals of persons when employed to do so. She states, that he attended her husband's funeral on the 25th of February, 1836, and that a conversation passed between her and the deceased to this effect :—said the deceased, " Have Mr. Timbrell left a will ?" She replied, " Yes ; and I hope, Sir, you have settled your affairs." The deceased said, " I have ; and I have left Alderman Wood and Mr. Chadborn the bulk of my property. They two are my executors." I answered, " I am very glad of that, Sir, and that you have thought of Alderman Wood, because he had taken the Queen's part." Now recollect, this is a conversation passing in the year 1836, and Mr.

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Alderman Wood's exertions in favour of the Queen must have taken place in 1820, a period of sixteen years preceding this, and I cannot but look upon that style of declaration of her gratification, that the deceased had remembered Mr. Alderman Wood because he had taken the Queen's part, with some degree of suspicion, because it is upon that special ground that Mr. Alderman Wood became acquainted with any part of the deceased's family, namely, the deceased's sister first, and then afterwards with himself. It looks, therefore, too much as if a ground had been suggested by something that passed at some other period than the conversation itself; it is hardly likely that this lady, being at the time of the examination of the age of thirty-six years, should have felt so extremely gratified that the deceased had remembered Mr. Alderman Wood's services which had occurred sixteen years before this conversation took place. I cannot but think, therefore, that but little regard is to be paid to a witness who comes forward to give her testimony in such a form as this, and more particularly when you come to look at the nature and form of the declaration:—
“Has your husband left a will?” “Yes, Sir; I hope you have settled your affairs.” Now it appears very extraordinary that he should disclose to a tenant in occupation of one of his farms that secret which he was so anxious to preserve, that he would not even permit the paper which contained the names of his devisees and executors to be in the same place of deposit as the other paper in which they were merely described as executors. That he should make this disclosure of his intentions to

tenants of his upon these several occasions when they went to him for the purpose of consulting him about their farms, it appears difficult to understand.

There is another declaration spoken to by this witness, in which she states that he had a great regard for Mr. Alderman Wood, and I have no doubt that he had a great regard for him; she states, that in a conversation respecting the property which he had derived under the will of the sister of the deceased, he said, "It will be all in the family after a bit." That is a recognition of a disposition in favour of Mr. Alderman Wood. But when did this sister die? When did Mr. Alderman Wood get possession of the property under her will? Why in the year 1824. It would, therefore, be an allusion to an event long past. The thing is improbable upon the face of it.

This witness also states, upon the 13th Article, that the deceased frequently said that Mr. Chadborn was a great friend of his, that he never charged him anything, and that she always thought and expected that Mr. Alderman Wood and Mr. Chadborn would have his property, and that she was quite surprised to hear the contrary. Now that does not at all recognize the existence of this will in any other manner than as showing that his intention was that Mr. Chadborn and Mr. Alderman Wood should have a part of his property, not that he had disposed of it in equal parts to them and the other persons I have mentioned.

Then there is Mr. Abell, who was an articulated clerk to Mr. Chadborn, from 1816 to 1822. *Mr. Abell* states, that in the year 1825 he bought a

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stable of the deceased, and in consequence of some demur which had arisen as to the transfer of the conveyance of this property, he threatened to file a bill against him, and in the course of conversation, talking upon this subject, the deceased says to him, "Here is my friend, Mr. Chadborn, he will have a good part of my property after my death, and he will not mind spending a thousand pounds before Bowden shall have it." Now, really, when a conversation in 1825 is brought forward to show a probability of disposition in the year 1834, and afterwards continued to 1836; it is a very slight circumstance indeed from which to infer an intention to benefit Mr. Chadborn. At this time also the deceased sister, Mrs. Willey, was alive; she did not die till 1833.

A witness of the name of *Woodcock*, who is postmaster at Gloucester, speaks of the great confidence the deceased had in Mr. Chadborn. He says, "You know he is my lawyer, and makes me no charges; I shall remember him for it. I cannot depose that I have heard the deceased say that Mr. Chadborn would be his principal legatee or his executor, although it was my opinion that Mr. Chadborn would be so." He expected that he would be the executor, and would be the principal legatee in the will; but there is nothing precise in this declaration. It is much too general and indefinite to satisfy the Court that, even supposing these declarations had been made after the date of the will, they had any reference to the papers of the second and third of December.

Then another conversation takes place in 1833, with respect to a part of his property, which there

was a dispute about, called Wood's Mill. In consequence of some claim made by a person of the name of Bowden, some difficulty as to the title arose, and he says that he urged the deceased to make his will, or his money would be spent amongst lawyers, which he would not like, and the deceased expressed immediate assent to that observation. (But unfortunately it does so happen that, in this case, whether the deceased liked it or not, a large portion of the property will be spent for the benefit of the lawyers.) He says, "he desired me to send for Chadborn, and we'll see if we can't cut him out of it," referring to Mr. Thomas Wood; who Mr. Thomas Wood is does not exactly appear. I think it is not improbable that that led to the execution of a certain deed, which appears to have been burnt after the death of the deceased by Mr. Chadborn, as it is suggested, under the advice of Mr. Phillpotts.

Now, in the month of March, 1835, *Mr. Samuel Hitch*, a surgeon of one of the hospitals, has a conversation with the deceased, in which he adverts to Mr. Chadborn as being a very good man, that he never charged him anything for law business; that he had sold some land for him for a thousand guineas an acre, which his father had bought for a few pounds. So far as that goes, there is no recognition whatever of the will. In March 1836, however, he says there was a conversation relating to his farm, with reference to some alteration of his rent, in consequence of some expense he had incurred, the deceased referred him to Mr. Chadborn: he said, "I must consult his Honour; that it would be all his Honour's; that his Honour would

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be a great man some day ; but he never made any more specific declarations as to who were to be the principal legatees and executors." That was what occurred upon this occasion ; to be sure, nothing can be more loose and indefinite, when it is attempted to sustain the actual dispositions contained in the paper which is headed " Instructions for a Will."

Again, he says, in November, 1834, he referred him to Mr. Chadborn about a farm, and at Christmas, 1834, this witness has a conversation with him with respect to a report, which was prevalent in Gloucester, as to the deceased's intention to devise his farms to his several tenants ; that upon that occasion, he told the deceased what he heard, and the deceased said, " Aye, aye, you be a nice man—people will say anything—I have made my will—his Honour knows all about it—it is all his Honour's." This circumstance can have no effect. It would tend to show, not that he had given his property to these four gentlemen, but that he had given all his property to Mr. Chadborn. It is clear, however, that the deceased's intention was to get rid of the solicitation of *Mr. Hitch* to have some allowance made, in consequence of the money he had expended in the repairs on his farm. That is proved, by the evidence in the case, to have been the usual course pursued by the deceased, who was extremely glad to avoid any references of that kind which were made to him. He goes on to state that, in the month of March, 1836, he requested him to abate a year's rent : " He referred me to Mr. Chadborn, and he said, go and talk to my friend Chadborn about it ; he may do as he

likes about it;" and he was desired to pay his rent to Mr. Chadborn. This only shows that the collecting part of his rent and the management of his property were given to Mr. Chadborn, and that he acted as an agent for him.

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In the month of April, 1836, it appears there was a year's rent abated; that, upon that occasion, he had a conversation upon the subject of his farm, and particularly a coppice called the Ash Coppice, which was a part of it; that he was in conference with the deceased about an hour respecting it; that he talked about coming to see it in the following summer, and then he goes on to say, "I must talk to his Honour about it—it would be all his Honour's;" but he did not say who were to be his executors. This evidence shows that the deceased was not making any sincere declaration of what he had done in his will; but he said that, amongst other persons who were to be benefited, or rather, not amongst other persons, but that the person who was to have the sole benefit was to be Mr. Chadborn, that "it would be all his Honour's."

Therefore, so far as these declarations have gone hitherto, there cannot be derived from them anything to support the disposition contained in these papers. Still less do they prove that it was ever the intention of the deceased, when he executed the paper of the 3d of December, that the other paper of the 2d of December should form a part of his will. Nothing can be so wide of the mark as these declarations are of that fact. They refer to persons who were, as he said, to have the whole of his property, which was by this will to be equally shared by them with other persons, and they have nothing

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at all to do with the dispositions contained in the paper, headed "Instructions for his Will."

There is another witness, of the name of *Sutton*, a respectable gentleman, who came to reside at Gloucester, in the year 1830; and who appears to have been upon very intimate terms with the deceased. He says, the deceased entertained a high respect for Mr. Osborne, who was an assistant in his business for between thirty and forty years, and that he often expressed himself in terms of high approbation of him, saying, "Jacob is an honest man, and I will leave everything to him." That is a strange declaration to make, for he had about the same period of time intimated to those other persons that it would be all his Honour's,—that is, Mr. Chadborn's; that Mr. Chadborn or that Mr. Alderman Wood would have the greater part of his property. But Mr. Sutton states that he said, "Jacob is an honest man, and I will leave everything to him;" and he frequently repeated those expressions within the last two years of his life, that is, from 1834 to 1836,—that he would leave everything to Mr. Osborne. Now, to be sure, if this had any reference to this paper, by which he has left his property to four individuals, it would show at least that he did not recognize it as an existing intention, but that he meant to alter it, and, at all events, that he meant to leave everything to Mr. Osborne, and not to Mr. Chadborn, Mr. Surman, and Mr. Alderman Wood.

Upon the 13th article, he says, that he very often mentioned Mr. Surman. "He spoke of him in terms of regard, that is, in the manner in which the deceased was wont to express regard. He said

that he (Surman) was his nearest relation by the women's side, but that he never heard him express his testamentary intentions respecting him; that he was too guarded for that." Now, I am at a loss to understand what this gentleman means, he having, with respect to Mr. Osborne, declared that he would leave him everything, but that, with respect to Mr. Surman, he was too guarded for that. I do not understand why he should be cautious in mentioning his intentions with respect to Mr. Surman, when he declared them so fully with respect to Mr. Osborne. But be that as it may, there is some misunderstanding on the part of this gentleman, in giving this deposition. He could not have meant to say that he was too guarded to express his testamentary dispositions with respect to Mr. Surman, when he had declared it so fully with respect to Mr. Osborne. It is immaterial.

But now we come to something which is much more definite, and much more important, with respect to the period in which the declaration was made. . He says, upon the 39th Article, that in the month of December, 1834, the deceased complained that his bank deposits were diminishing, although, as he said, there was plenty of property to secure all his customers, as he had proved by a letter, stating the property of which he was possessed, and entering into some particulars of the manner in which that property had been acquired. He could not understand why this diminution of the deposits took place. *Mr. Sutton* says, "I reminded him that, unless the public mind was satisfied that, in the event of his death, their moneys would be immediately receivable, it would

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follow that his banking business must diminish, “notwithstanding the security which his large property afforded.” He says, that upon the first of December, 1834, he was at the deceased’s house, and had upon the occasion some conversation with Mr. Surman upon the propriety of the deceased making his will. Mr. Surman said they were anxious that he should make his will; and that, upon that occasion, he proposed to *Mr. Sutton* to speak to the deceased about it, and that accordingly, at six o’clock upon the same day, he called upon the deceased, and, entering into conversation with him, he told him that he thought it was high time that his will should be made: he says, “Aye, aye, I must;” upon this he dropped the subject, and soon after took his leave. He says he made a note of this visit on the 2d of December. Upon the 4th of December, he says, “I again called on the deceased, and going with him into his parlour, I reverted to the subject of making his will, rather, as I believe, hinting at it than mentioning it in direct terms; the deceased rapidly comprehended me, and said, “I have settled my affairs—my debts will be paid when I die.” That is the expression which the deceased made use of. Now, how does this recognize anything in the shape of paper (A)? It might be said to be a recognition of paper (B), which had been executed on the 3d of December, but how is it to have reference to paper (A), which is “instructions?” Does that go to prove that it was his intention that this paper should form part of his will?

What is the impression made upon the mind of *Mr. Sutton*? It was said that the impression upon

the mind of the witness is nothing, that the Court only wants to know what the deceased said ; but unfortunately the Court can scarcely ever get from witnesses the precise words made use of upon particular occasions. He says, " The impression made upon my mind was too powerful to be forgotten. It struck me as remarkable that he did not say that he had made his will ; he only said that he had settled his affairs, an expression which," he says, " struck me forcibly." He goes on to state, " The impression made on my mind by what the deceased said on the fourth of December, namely, ' I have settled my affairs, my debts will be paid when I die,' was that he had not made a will, that is, a will by which he had bequeathed his property in the way of legacy." Therefore, there is here no recognition of this will of the second of December, but only a general recognition that he has made his will, and that his debts will be paid when he dies, which is as well satisfied by the will of the third of December as it would be by reference to that of the second. I do not think, therefore, that the evidence of *Mr. Sutton* goes further than to show that, at this time, the deceased declared to him that he had settled his affairs, and that the debts would be paid ; and this with direct reference to the cause which had led to the diminution of the deposits in his banking concern, namely, the apprehension that if it was known that he had not made his will, some apprehension might be entertained that the money would not be forthcoming at his death.

But the witness principally relied upon is a gentleman of the name of *Stevens*, a paper manufacturer, in partnership with his father, who, in the

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month of June, 1835, had a conversation with the deceased respecting his affairs generally; and he states that, in the course of conversation, Mr. Chadborn was alluded to, and the deceased said that he had been his attorney, and that he, *Mr. Stevens*, was recommended by the deceased to employ him as his solicitor. The deceased said, “Mr. Chadborn is my attorney; he has done my business for many years, and has not charged me anything.” Upon this I said, “You ought to remember your friend, and put him in a corner of your will;” to which the deceased answered, “Aye, that I have,” or “that I will.” The recollection of the witness does not serve him to that extent whether it was “I have,” or “I will, put him in a corner of my will;” that being in the month of June, 1835, after the date of the will. That, however, is very immaterial; it is a very loose and a very equivocal declaration of the deceased, not recognizing the contents of the will, or the amount of benefit to be conferred upon Mr. Chadborn, but only that he had or would put him in a corner of his will.

But the declaration upon which the greatest reliance has been placed is to this effect:—The witness deposes, that early in the month of September, 1835, either the fourth or the sixth of that month, in consequence of a report that the deceased had not made his will, he said to him that he ought to satisfy people that he had made a will. That he went in consequence of a communication between him and his father as to the probability of the money being paid at the deceased's death, and he went with a letter from his father authorizing him to withdraw the balance from the deceased's hands,

if he was not satisfied that he had made his will. He says, that he told the deceased that he ought to satisfy him upon that point. The answer of the deceased was this—"I respect your father very highly; do you tell your father that I have made a will, and that I have left my property to four individuals," or to "four good men." Now here he is coming nearly to the contents of this paper of instructions; he does not name the whole of those four gentlemen, but he says, "they are my executors, and they will pay you and your father, and every one else," or words to that effect. The deceased, as of his executors, said, "two of them are Alderman Wood and Jacob."

Now, that certainly does go pretty precisely to the contents of the will. But it must be recollected that it is a declaration standing alone, the only one made to any of the witnesses in which a reference is made to four persons, as sharing in his property, and with reference to an expression which is made use of, and which is said to have fallen from the deceased at the conclusion of that conversation, when he said, "two of them are Alderman Wood and Jacob; I am much more composed in mind since I have settled my affairs;" I think that is hardly referable to a will which had been made in December, 1834, this taking place some nine or ten months after, namely, in the month of September, 1835. I cannot but think that there is some reason to suppose that the deceased, in the intermediate time, was referring to some other document which he had made. It was a much more natural observation to be made by him with reference to an instrument recently executed, than to one made

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nine or ten months before. And, supposing that the deceased was at the time contemplating any disposition of his property different from that which he had made by this former paper, then this declaration, that he was much more composed in mind since he had settled his affairs, would have much more direct reference to that than to a paper which was made nine or ten months before. Considering the report which prevailed, that he had not made his will, and the desire which he had to satisfy persons that he had, and that their money would be forthcoming, and that persons were appointed who would pay any demands upon his house, this does, I think, rather look like an endeavour to get rid of importunity, and to satisfy the minds of his customers, without acknowledging any direct and positive act as having been done, by which that object could be accomplished; and I think it does not at all necessarily support the supposition that he had given his property to the executors for their own use and benefit, but that he had given the management of his property to persons who would pay his debts after his decease, and satisfy any demands upon his house. This is a single declaration, whatever may be the effect of it, made by a man, evidently an insincere man, wishing to lead persons to believe that everything was done that was necessary for their benefit and advantage. It was observed by the counsel, in arguing this case, that even what he had done was rather with reference to his own convenience and his own profit than with a desire to benefit those to whom he was speaking; and it is impossible to place such reliance upon the evidence of one single witness, under these

circumstances, as to hold that that is sufficient to establish this paper as, in the opinion of the deceased, an existing and operative document, forming part of his will.

There are some other declarations which are of minor importance. Those to which I have referred are the great strength of the case on the part of the executors. These are the declarations upon which they most rely for the establishment of their case, for the paper itself does not purport to have any other connected with it as forming part of itself. The evidence negatives the publication of this paper as part of the will, and therefore it is only by declarations and by recognitions that they can establish that case which they have set up, namely, that paper (A) is entitled to probate, as forming part of the will of the deceased.

In the month of March, 1836, *Mr. Need*, who was a tenant of the deceased, enters into conversation with him, apparently for the purpose of eliciting his intentions with respect to the disposal of his property after his death. Now, it is remarkable that *Mrs. Davis*, *Mrs. Timbrell*, and *Mrs. Williams*, all make these inquiries of the deceased, and the deceased answers them without the least hesitation and reserve—such a person will have a part, and another person will have a part. There was no concealment on the part of the deceased, and it is extraordinary that if these declarations were made to these parties there should be any doubt whether the deceased had made his will or not, for his object was to let the world know that he had made a disposition of his property. *Mr. Need* goes on to say, “ I asked him in so many terms what he

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meant to do with his landed property ;"—Mr. Need was his tenant ; I presume that he had heard some intimation that he might have some part of that property which he occupied, " as I had heard that some of his tenants were to have some part of it, I said that I hoped that he would leave it so as to do good ;" and the observation which the deceased makes is this, so late as the month of March, 1836, a very short period before his death,—that Mr. Surman would have part of it, and Mr. Chadborn would have part of it ; Mr. Chadborn had done his law business for many years, and that he supposed that he must leave him part of his property. The deceased spoke in praise of Mr. Chadborn and Mr. Surman, and said he would have part of his property. That is the utmost extent to which this gentleman goes, that he would have part of his property.

These are the principal declarations and supposed recognitions of this will which are spoken to by the witnesses examined on the part of the executors ; and it appears to me that they fall infinitely short of that which the law would require, to repel the presumption arising from the execution of a paper of posterior date to that of the instructions for it.

Some witnesses, however, examined by the propounders of the codicil, speak to certain declarations made by the deceased. One of them is Mr. Stanley, who, in the spring of the year 1835, has a conversation with the deceased on the subject of his will. He tells him that he has made his will, and that his business would be carried on by those in the shop. The question was,—How is the business to be conducted ? How am I to assure my cus-

tomers that they will be paid after my death, in order to prevent a further diminution of the amount of deposits? Accordingly he says, "My business will be carried on after my death by Surman and by Jacob." No allusion is made to Mr. Chadborn or to Mr. Alderman Wood, as being executors, either for their own benefit or for the purpose of carrying on the business, but Surman and Jacob are the two persons who he says are to carry on the business.

Again, there is a person of the name of *Webb*, who states a conversation with the deceased, a week before his death; that he said to the deceased, meeting him in the garden, "Sir, I have heard that you have made your will, and given all your property to three or four persons." The observation which the deceased makes is, "Who told you so?"—He does not say that he had done so;—"Well, if I go first, I think you will find that I have given satisfaction;" and that is the utmost extent to which that declaration goes. He merely says that there was a general impression at his death that he had left his property to those four executors, and very probably it was so; for it was the interest of the executors that that report should obtain as much circulation as possible.

I have already adverted to the evidence of Mr. Daniel Smith, with respect to the probability of a disposition in favour of those persons. Mr. Smith does not speak to anything like a recognition of these papers. He says, that the deceased possessed great confidence and regard for Mr. Osborne and Mr. Surman, and also Mr. Alderman Wood and Mr. Chadborn, and that he was not surprised that

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he had left his property to those four individuals, but that he was surprised that he had left all to them; and, considering the vast extent of property of which he was possessed, it must have been a matter of surprise to the inhabitants of Gloucester that he should have left the whole of his property to them.

Then *Mr. Charleton*, the master of the Blue-coat School of Gloucester, also speaks of what was the impression at Gloucester, that it was considered extremely probable that Mr. Chadborn would benefit considerably under the will of the deceased. "It certainly would have very much surprised me if he had made a will without therein giving some considerable benefit to Mr. Chadborn."

These appear to me to be the only declarations which can by any possibility be considered as affording a ground for suggesting that this paper (A) was recognized by the deceased as an existing and operative instrument. Now it is to be observed, with respect to all these conversations, that, with one exception only, he never mentions all the executors together. Sometimes it is that Mr. Chadborn is to have it; sometimes "Chadborn and the Alderman;" sometimes "John and Jacob;" that is, Mr. Surman and Mr. Osborne; sometimes that it is "all his Honour's;" sometimes that "Mr. Chadborn would have the greater part of his property;" sometimes it is that "Mr. Alderman Wood and Mr. Chadborn are to have the main of the property; they two are my executors;" and at other times that "Mr. Surman would have part of the property, and Mr. Chadborn part." They are all loose and very vague declarations, with the

exception of that one made to Mr. Stevens, which is more precise and definite, but still not sufficient to satisfy my mind as amounting to a recognition of that paper as a subsisting instrument.

These, and the rest of the declarations in the case, appear to me to show rather that the deceased had not made up his mind as to the appointment of executors, or the final disposition of his property. They show that his mind was vacillating; that he was weighing what was right and proper to be done; that he found a great difficulty in determining how to dispose of that vast property, which he possessed, which weighed upon his mind and prevented his making his will in 1831, 1832, and 1833, when he was in communication with Mr. Horner, the clerk of Mr. Chadborn. The property, he said, was so large that he did not know what to do with it, and upon that occasion he offered his sister a part of his property; and there seems no reason why the same difficulty which then existed in his mind should not have prevailed up to the time of his death, and thus have prevented him from making a final disposition of his property. It is plain that, in 1832 and 1833, he had not made up his mind that the bulk of his property should go to the persons whom he named as his executors, though he might intend to give them considerable portions of it, to provide handsomely for them, but still the very extent of the property was that which induced hesitation, and made him unwilling to execute his will.

It appears also, in the evidence of *Mr. Higham*, a very respectable witness, who has been produced upon the *condidit*, that he urged the deceased to

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make his will, and that the deceased at that time put it off upon the ground that he had lost two wills, and that when he found his will he would make another. It appears that he required to be urged on to make a disposition of his property; he could not finally make up his mind how to do it; he vacillated from day to day as to the manner in which it should go; and if instructions were given on the 2d of December, it is impossible, from the manner in which the transaction was conducted, to have any explanation of what passed between him and Mr. Chadborn, because Mr. Chadborn was the writer of the instruments, both of the 2d and of the 3d of December.

Therefore I am not satisfied in my own mind that the deceased did intend that this paper of the 2d of December should form any part of his will; still less am I satisfied that the presumption arising from his having executed a subsequent will disposing of the whole of his property is repelled; nay, I am very much inclined to think that all the circumstances, when taken together, rather fortify than weaken the presumption of law, namely, that the execution of a will of later date does supersede the instructions for that will. Nor do I think at all that the case of the executors is strengthened by the means which have been resorted to to facilitate the obtaining probate of this paper. It argues in my mind a diffidence of their own case. It shows that they did not dare to trust to the cross-examination of the witnesses as to the publication of the will at the time of the execution. It shows that their feeling was, that though it might have done very well to have trusted to the evidence of those wit-

nesses in the deposition in chief, coupled with the appearance of the papers, yet that they had a diffidence in their own case, by attempting to fortify it by an alteration in the condition, character, and situation of these papers at that period of time, without any communication with the deceased, and when communication with him was rendered impossible.

Upon this part of the case, therefore, I am of opinion that the executors have failed in establishing paper (A) as a part of the testamentary dispositions of the deceased; I consequently pronounce against the validity of that paper. Paper (B) depends on very different considerations. That paper is proved to have been the act of the deceased. It is proved to have been executed by him after having twice carefully perused it. It is executed by him, and is found in his own custody, in his own possession; that paper, therefore, would be entitled to probate, if it were not that at present there are no parties before the Court who have an interest in propounding it, because the whole interest of the executors depends upon the establishment of the paper of instructions of the 2d of December; and as the Court is of opinion that that paper cannot be supported as part of the will of the deceased, the interest of the executors is disposed of, and there is, therefore, no person who has an admitted interest before the Court, who is entitled to propound that paper, or who would be entitled to have administration with the will annexed.

It is true that the interest of Mrs. Goodlake has been admitted by the executors; but they are now no longer parties to the cause. The admission

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would not prejudice Mr. Hitchings, and Mr. Hitchings might choose to deny her interest. Mr. Hitchings is not admitted before this Court as the next of kin of the deceased, by any person whatsoever. He is admitted as contradictor to the will by the executors, but, as I have said, they are no longer parties—they are no longer interested to sustain that opposition to this paper which is afterwards propounded as a codicil. It does seem to me that the Court must content itself, therefore, with pronouncing against the validity of paper (A), but that it must withhold any expression of its opinion with respect to paper (B). It is not necessary that the Court should pronounce further at present.

To the observations I have made there is one which I wish to add, and it is with respect to the declarations and recognitions of the paper, as made by the deceased, by mentioning all four of the executors at one time. Now, I have adverted to the evidence of the witnesses in the cause, but I have not adverted to the answers of Mrs. Goodlake. I thought that it would be more convenient to reserve that for separate observation, because I do not intend to lay any stress whatever, or to place any reliance upon the answers of Mrs. Goodlake, which have been made in this cause. It is true that, in addition to what is spoken to by Mr. Stevens, as to the four persons named as executors, *Mrs. Goodlake* states, that upon the day before the deceased's death, having come to attend upon him in consequence of his sickness, that is, upon the Monday before his death, she had some conversation with him respecting the disposition of his property, and that upon that occasion he referred by name to those

four persons as those who were likely to manage his property, speaking of them in terms of approbation, and mentioning all their names, and therefore as recognising, to a certain extent, at least, the disposition contained in this paper of the 2nd of December, 1834. But, as I have already said, I must decline to pay any regard whatever to the answers of *Mrs. Goodlake*, as against any other party but herself: she has a right, if she thinks proper, to sacrifice her own interest by making, as against herself, admissions to any extent she may think proper; but, under the circumstances in which she stands with reference to these proceedings, I cannot consider her in any other light than as, in point of fact, a party with the executors, to support the will propounded by them. She is, undoubtedly, in name an opponent; but, looking at the circumstances to which I have adverted in the early part of my observations, and looking at the affidavit of Scripts, as attested by Mr. Surman Cox, who is the solicitor of her son, Mr. Surman, in these proceedings, and who is in communication with the solicitor for the other parties in the cause on behalf of the executors; looking also at the execution of the proxy and the admission of her interest, without any special proxy from the parties authorising such an admission; looking also at the fact that she has not examined a single witness, or addressed a single interrogatory to any of the witnesses who have been examined in the cause,—I say, looking at all the circumstances in the cause, I am of opinion that she is not a real opponent to the will. It was said, in the course of the argument, that there was no doubt that she had a fellow feeling with the execu-

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tors in the cause. One of the witnesses, I think *Mr. John Kendall*, says, that he has no doubt she is not opposing the executors in their endeavour to obtain probate of this will; I, therefore, consider her as, in point of fact, identified with the executors, and therefore I cannot place any reliance upon her answers,—not meaning at all to say that she is perjured in the admissions she has made, but declining to enter into the inquiry whether she has made such declarations or not—I will not prejudice either the case of the legatees under the codicil by any declarations she may have made, and still less will I prejudice the interests of Mr. Hitchings, the other next of kin, by taking her answers and her admissions as operating against him. To admit the answers of such a party to be read against any other individual would be unjust. There is, in point of fact, no means by which the real truth of what did occur between her and the deceased can be elicited. There is no mode of cross-examination of this party; she is taking part apparently in opposition to the will, but in fact she is supporting and doing all she can to serve the cause of the executors. Under these circumstances, therefore, I am disposed to say, that I will not enter into any inquiry as to what those declarations which were made to her by the deceased were, or what effect they ought to have. I reserved these observations to the latter part of this branch of the case, as affording the reason why I have not adverted to it before I came to the conclusion to which I have arrived with respect to the validity of the will.

Having thus expressed my opinion as to the two papers which are propounded as together containing

the will of the deceased, I now proceed to consider the remaining part of the case, namely, the effect of the evidence in support of the paper, propounded as a codicil. Its contents are certainly somewhat unusual with reference to the amount of the property disposed of, as compared with codicillary dispositions in other cases; but there is nothing in the codicil so startling in the amount of the bequests, as to raise any great degree of astonishment; because, considering the situation of the deceased, how distant the relations were who had any claims on his property, it was probable that he would select those particular friends and companions for whom he had the greatest regard. The codicil is as follows:—

“ In a codicil to my will, I gave to the Corporation of Gloucester 140,000*l.* In this I wish my executors would give 60,000*l.* more to them, for the same purpose—as I—have before named. I woud also give to my friends, Mr. Phillpotts, 50,000*l.*, and Mr. Geo. Council, 10,000*l.*; and to Mr. Thomas Helps, Cheapside, London, 30,000*l.*; and Mrs. Elizabeth Goodlake, mother of Mr. Surman, and to Mr. Tho. Wood, Smith-street, Chelsea [“ each” interlined] 20,000*l.*; and Sam Wood, Cleveland-street, Mile End, 14,000*l.*; and the latter Gentn Family, 6,000*l.*; and I confirm all other bequests, and give the rest of my property to the Execs, for their own interest.

“ JAMES WOOD.”

“ *Gloucester City Old Bank,*
“ *July, 1835.*”

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The paper is burnt at one corner and torn in two places ; but it is not deficient in any part of the writing. The amount of property bequeathed by it is two hundred and ten thousand pounds, and the one hundred and forty thousand pounds it recites as having been given to the Corporation of Gloucester by a former codicil (which is not forthcoming), would make the whole three hundred and fifty thousand pounds,—a very large sum undoubtedly, with reference even to the deceased's property, being nearly one-half ; but there is nothing on the face of the paper which, in this respect, should render it a subject of suspicion. It is very possible, if another codicil was executed, the names of other parties would have appeared among the legatees—Mr. Higham, for instance, the omission of whose name in this codicil is one of the grounds of suspicion, in respect to its genuineness, in the mind of Mr. Sutton. But there is no trace in the evidence of such a codicil having been executed ; and, therefore, before the Court can enter into the inquiry by whom that codicil was destroyed, it must be satisfied that such a codicil was once in existence, of which there is no proof whatever, beyond what appears in this paper. The paper itself was produced in a very mysterious manner. It was sent through the threepenny post to Mr. Helps, and communicated to the executors at the earliest period. And although very large rewards have been offered, the writer and transmitter of the letter has not thought proper to come forward. The case, therefore, labours under a burden, which it is difficult to remove, of having no person to give any account of its execution by the deceased. The letter which

accompanies the paper contains undoubtedly a charge against some person or other of a most atrocious character, namely, an attempt to burn the paper, along with others. Who are the persons alluded to in this letter the Court has no means of exactly ascertaining; but from the nature of the plea given in, it is impossible not to see that the executors, or some or one of them, or some person or persons connected with them, and acting under their directions, are supposed to have some knowledge, at least, of the alleged destruction; if not themselves the immediate agents. The Court will not stop to inquire whether or not it is in a cancelled state; or if it be so, whether it was the act of the testator himself; because there is no clue to this fact, and the Court must be satisfied, in the first place, that the paper was ever executed by him; and secondly, if it was so executed, how it was obtained from his possession, and treated so as to give it the appearance it now presents.

The testator died on the 20th of April, 1836; the large property he possessed, and the reports which prevailed in Gloucester as to its disposition, created a great sensation and interest in that city; a great number of inquiries were made as to whether there were any other testamentary papers discovered or forthcoming. On the receipt of this paper, an appointment was made, and it was communicated by Mr. Helps and Mr. Wilde, his solicitor, to the legal advisers of the executors, Mr. King and Mr. Phillpotts, on the 10th of June, and it was deposited in the Registry of the Court on the 13th. Mr. King and Mr. Phillpotts, as was natural, immediately communicated the circumstance

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to the executors, who met in London on the 13th, (the day on which the paper was deposited in this Court,) and it was inspected by them. The same day, a communication was made to the Mayor of Gloucester; and another letter was written to him on the 17th of June; and advertisements were inserted in the papers, offering a large reward (ten thousand pounds) for the production of the codicil referred to, and also for the writer of the paper enclosing the codicil of July, 1835.

It must be admitted, that those who undertake to propound such a paper have a difficult task to perform; for the *factum* of the instrument has nothing to depend upon but the evidence of handwriting; and it is admitted that the Court cannot pronounce on such evidence alone for the validity of a testamentary paper; in all cases there must be something to connect it with the supposed testator. The principles upon which the Court acts, with respect to such papers, have been repeatedly laid down, and are to be extracted from various cases:—*Machin v. Grindon*, (a) *Saph v. Atkinson*, (b) *Crisp and Ryder v. Walpole*, (c) *Rutherford v. Maule*, (d) and *Bussell v. Marriott*. (e) The principle is this, that it is a rule of law absolutely binding on the Court, that evidence of handwriting alone is not sufficient to establish a testamentary paper (I am now quoting the words of Sir John Nicholl in the case of *Crisp and Ryder*, (f) without something to connect the act with the deceased, and this rule is founded on the facility of imitating handwriting so nearly as to deceive persons who

(a) 2 Lee's Cases, p. 406. (b) 1 Add, p. 213. (c) 2 Hagg, p. 513.
(d) 4 Hagg, p. 213. (e) 1 Curt., p. 9. (f) 2 Hagg, p. 539.

See however Judge
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2 Moore P.C. 355.

are best acquainted with that of the deceased ; it is, therefore, required, either that it should be found in the deceased's repositories at his death (it unfortunately happens, in the present case, that the repositories of the deceased were not very secure places), or that there should be some direct recognition by the deceased, or some other circumstance of strong probability, leaving no moral doubt on the mind of the Court. This rule must be binding on the Court ; for though the legatees are under some disadvantages which have not occurred in other cases, and though the manner in which the attempt is alleged to have been made to destroy this paper, and in which it was preserved, may induce the person who transmitted it not to come forward ; the Court cannot act on conjecture only, or on any principles which do not apply to every case where the circumstances were of a similar nature.

There are circumstances pleaded in the allegation, which are certainly of some importance (supposing the Court could arrive at the conclusion that this paper is the act of the testator), with respect to the destruction of the instrument, and create a distinction in favour of this case, which induced the Court to allow a latitude of plea ; namely, that the parties interested in the suppression of this paper (supposing it to be the deceased's act), were in possession of the deceased's house ; his papers were in their custody and under their control ; they had access to his repositories, both during his lifetime and after his death—and they had, therefore, a full opportunity of destroying or suppressing any papers which they might not wish to see the light ; and it was alleged, and is now

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admitted, that one paper, having something of a testamentary character, was destroyed a day or two after the deceased's death by Mr. Chadborn, acting under the advice of Mr. Phillpotts. The allegation pleads that the legatees had been refused access to the servants in the deceased's house, unless in the presence of an agent of the other parties; and they were not likely, under such circumstances, to elicit any information as to the destruction of this or the other codicil. These and other circumstances led to the admission of this allegation, which, under ordinary circumstances, would not have been entitled to admission. The allegation was, therefore, necessarily, in some respects, what is termed a "fishing" allegation; the parties had some intimation of what had occurred, but not sufficient information of other facts (which were within the knowledge of the other parties) to enable them to frame their plea so specifically as is expected when the facts are or ought to be in the possession of the parties pleading. This allegation went to impeach the conduct of the executors, not only with respect to the codicil of July, but also as to the former papers propounded as the will. A responsive allegation was given in by the executors, in which they replied to some of the imputations against them; but other points were left to be explained by their answers.

In this part of the case, as in the other, the probability of the disposition has been discussed at considerable length. The amount of the deceased's property, the absence of any persons in a near degree of relationship to him, the friendship and regard he entertained for certain of the legatees,

were strongly urged, and various declarations were pleaded in favour of some of the legatees, and the continuance of friendship and regard for them to the latest period of his life, so as to lay a ground of probability for such a codicil. The allegation also pleaded that the executors, having access to the deceased's repositories, might, as others had done, have abstracted the codicil referred to in this paper of July, and also have got possession of this codicil itself, and might have attempted to destroy it; and this was rendered the more probable, as wills had been on former occasions abstracted from the possession of the deceased, of which he had complained. This is pleaded in order to repel the presumption of law, that the paper was destroyed by the deceased himself. The allegation then went on to plead the handwriting of the deceased, to be proved by the evidence of persons who had seen him write.

Now by far the greatest part of the evidence which has been taken upon this allegation, goes to the question of handwriting: I think no fewer than twenty-three witnesses have been examined upon one side, and nineteen or twenty upon the other, and very long and very numerous interrogatories, some of a hypothetical or of an argumentative nature, have been administered to those several witnesses. I am sorry to say that the result which has been produced by this evidence is that to which the Court has been led upon all other occasions in which it has had the necessity of considering evidence upon controverted handwriting, namely, to place it in such a situation as not to be able judicially to satisfy itself whether the hand-

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writing is or is not the handwriting of the supposed testator. It may be true in this case, as has happened in many others, that the preponderance of the evidence upon the side of those who have affirmed it to be the handwriting of the deceased is so great as would justify the Court, if it were called upon to pronounce an opinion one way or the other, abstractedly from all other considerations, in favour of the affirmative, as in the case of *Bussell v. Marriott*, but it is not such as to carry judicial conviction that this paper so propounded is the act of the deceased himself. It must be established by some other circumstance than the mere handwriting that the act proceeded from the deceased.

It is certainly not the intention of the Court in this case to enter with any degree of minuteness into the examination of the evidence which has been taken upon this point, because it would not in this case, as it has not done in any other case, lead to any satisfactory result, and also because the learned counsel who argued this case on behalf of their several clients appear to have considered it their duty to refer only in somewhat a cursory manner to some of the leading witnesses on one side and the other. And another reason why the Court abstains in this particular case from doing that, is the great interest which has been excited on behalf either of the will or of the codicil in question, which renders it almost impossible for the witnesses on either side to come forward totally unprejudiced and unbiassed. But I must say that in this case there is, on the part of those who sustain the affirmative side of the proposition, this favourable circumstance, that they do not appear to have

entered into much discussion with each other as to the particular points on which their evidence should be grounded. They have a prejudice undoubtedly on their minds in favour of the instrument; they believe it to be, and I have no doubt conscientiously believe it to be, the act of the testator himself, and they depose almost uniformly in concurrence with that belief and with that impression upon their mind. But still that impression is created in a considerable degree by the circumstances of the case, or from thinking that the paper itself is a natural disposition as connected with the individuals purporting to be benefitted by it, or from some other circumstances which induced them to believe that it is the act of the testator himself.

Upon the other side I must say, that the same degree of avoidance of discussion, as between the witnesses themselves, does not appear to have been practised, for almost all those witnesses have come up to inspect this paper with their minds already impressed with the notion that it was, as Mr. Chadborn described it, an atrocious forgery; and, with respect to many of the witnesses, an impression had been made upon their minds by the exhibition of what was said to be a fac-simile copy of this codicil, made by persons employed upon their behalf, and further than this by meetings together of those persons who were called upon to depose to the handwriting, discussing the minute particulars in which it was supposed to differ from the deceased's general character of handwriting, pointing out to each other the difference of formation of certain letters, as compared with some letters in other papers

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written by the deceased himself, and upon those minute particulars many of the witnesses found their belief, that this is not a genuine instrument but a forged one.

Under these circumstances the Court can place no reliance upon the evidence of persons so differing amongst themselves, who have formed this opinion, after having met together to discuss the particulars in which they have, as they fancy, discovered discrepancies; having, as I have already stated, had their minds impressed in the first instance with the notion of the invalidity of this paper, by hearing it said that it is a forgery, and also by the exhibition of this fac-simile copy, from which they took their first impressions as to the handwriting not being that of the deceased.

Now with reference to the particulars in which they say this differed from the handwriting of the deceased in other documents alleged to be in the handwriting of the deceased, some of them say that his usual way of forming the letter (C) for the word city, as in "Gloucester City Old Bank," was not, as it appears upon the face of this codicil, with a loop to the (C) before the letter (i), but that it was continued to the next following letter, the vowel (i). That is one ground upon which the Court is asked to consider that this is a forgery, that in the words "Gloucester City Old Bank," the letter (C) is formed with a loop or bow at the end, separated from the vowel (i) which follows it; whereas they prove, in many of the documents exhibited, that the usual course of the deceased was to connect the letter (C) with the other letter without making any loop.

Another instance is, that the deceased was in the habit, in signing his name, of making the final (d) in his name with a straight stroke turned up at the bottom, whereas in this codicil, where he is leaving a sum of fourteen thousand pounds to Mr. Samuel Wood, he finishes it with a turn or a loop at the end. And again another objection is, that the lines are more or less uneven, and there are many other particulars adduced of that description. But one principal ground of difference which was relied upon was, that in the word "executors," he has made a cross for the (x), whereas his usual practice was first to make the letter (s), and then to cross that letter (s). Another objection was, that he makes use of a different formation of the letter (e) in some part of these papers, and that that is to be a ground of suspicion of forgery. But, upon looking at the books which have been brought into Court, very reluctantly, by the executors, it appears to me that most of these objections are very satisfactorily removed.

It appears by one of the documents which is annexed to the deposition of Mr. Sutton, that the final (d) to the word "Wood," is in that made with a tail, his usual mode of signature was by an upright stroke. In that very letter the formation of the (e) is different in the same word, and with respect to the formation of the letter (C) in the word "city," there are three or four instances in those books of the same form and shape as the letter (C) contained in this codicil. It shows how impossible it is for the Court to rely upon any minute differences or discrepancies of this kind,

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more particularly when all the witnesses concur in stating that they never recollect to have seen a person whose handwriting differed so much as this gentleman's did in the different instruments he has executed, and the different ways in which he has signed his name, so as to render it extremely difficult for them to say whether such a particular signature is, or is not, the handwriting of the deceased.

With respect to the word "executors," upon looking through a vast number of papers which were copies of wills made by the deceased, which are in his handwriting, wills of his relations and friends, the Court does find that the (x) is generally made in the manner represented on behalf of the executors, yet that there are one or two instances at least in which it is made in the same form in which it appears on the face of this instrument, namely, by a cross, instead of originally forming an (s), and afterwards making a stroke to convert it into the letter (x).

There are also two witnesses who state, that as much unevenness is to be discovered in the handwriting of the deceased, as is apparent upon the face of these papers, and that the deceased, when he had once began to write in a particular direction, afterwards continued to write in that direction. It is impossible for the Court to form a decided opinion upon a circumstance of that description, unless it was assured that it had all the documents that were ever written by the deceased, or at least so many as to satisfy the Court that he never deviated from that particular method. It is impossible for any

person to form a decided opinion whether this is a circumstance which ought to create suspicion or not.

It is also stated, as an objection founded upon the evidence of Mr. Daniel Smith, a witness in support of the codicil, namely, that the figures which the deceased had used upon this occasion were contrary to his usual custom, for that he was never in the habit of expressing large sums by figures, but that he always expressed them by words at length, and he says that it was the advice which he always gave to persons who communicated with him never to express large sums by figures, because they were so easily altered. But it appears, upon the face of these proceedings, in the letter to Mrs. Raikes, which is annexed to the allegation of the legatees propounding this codicil, that he had three or four times over expressed by figures certain large sums, for instance, "60,000*l.* to his two daughters," and "10,000*l.* a-year in landed property," though he had, in the same letter, expressed one hundred thousand pounds in words at length, and there is also the expression "some hundred thousand pounds." This shows that he did not invariably adhere to that practice, though he might, on particular occasions, in papers which he sent out of his own possession, have expressed by letters and words that which he, in other instances, expressed by figures.

But there is another circumstance which I think would weigh very much in this case, if that had been his ordinary habit, namely, that there are here large sums to be repeated no less than seven or eight times over. This was a paper which was in-

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tended to be kept in his own possession, assuming, as I now do, that it was the act of the deceased himself; and therefore I think it was natural that, upon this occasion, he should have expressed those sums by figures, and not by words.

Some other observation was made upon a circumstance appearing upon the face of the paper, namely, that there were greater spaces left for certain words than those words would naturally occupy; and that consequently the words were extended so as to occupy a greater space than the same word would have occupied if it had been written at one and the same time with the rest of the instrument. Therefore blanks were left for certain words to be inserted, and, amongst others, was pointed out the word "more," which follows the gift of sixty thousand pounds to the corporation of Gloucester. All those have been pointed out with great particularity by the witnesses who have been examined in support of the genuineness of the instrument, but they all concur in stating that, though this does appear, and though there may be certain discrepancies in it, yet that they are so satisfied that it is the handwriting of the deceased, that their opinion is not shaken by any of those distinctions, and that they still remain, as they were at first, of opinion, that this is the handwriting of the deceased; and consequently, as far as their belief would go, tending to establish the genuineness of the instrument.

But it does not depend upon the evidence of the witnesses who have been examined in support of this instrument; because there are many other of the witnesses who have been examined, who, when

they come to be pressed upon the interrogatories, admit that the signature to this paper is infinitely more like the deceased's usual signature than the signature to paper (A), which is the paper of the second of December, 1834. There is the evidence of a gentleman of the name of Fulljames, which goes particularly to that effect; so far is he impressed with the notion in favour of it, that he says, if the paper of the 2nd of December had come from a questionable quarter he should very much have doubted whether the signature was that of the deceased himself; and almost all the witnesses who have been examined, and who express their conscientious belief in their examination in chief as to the want of genuineness of this signature and of the body of this instrument as being the handwriting of the deceased himself, are compelled to admit, when they refer to certain signatures of the deceased which are admitted to be his, and which are annexed to the allegation or the interrogatories, more particularly when they refer to a book which has been brought into Court, called the Claim-Book, upon the authenticity of which there can be no doubt whatever, they are all bound to admit, and do admit to the full extent, that there are an infinitely greater number of signatures which resemble the signature to this codicil than that of papers (A) and (B).

Now to advert to one or two of those gentlemen, who have been examined upon the other side, to prove that this is not the handwriting of the deceased. It has always been an observation in this Court, and necessarily so, being founded in reason, that evidence, to prove that the handwriting

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is not the genuine handwriting, cannot have the same weight attributed to it as that which goes to maintain the affirmative, that it is the genuine handwriting of the deceased, for reasons which it is not necessary for the Court to advert to, but which are stated in the cases. Here is a gentleman of the name of *Layton*, who is called in on behalf of the executors to examine the codicil which is now propounded. He is an engraver, and is called in by *Mr. Kentish*, who is also an engraver, employed by the executors to make a fac-simile copy of this instrument. I have already stated, in the course of the arguments on the hearing of this cause, that I hope such an expedient will never again be resorted to, and I must again impress it strongly on the minds of the registers, (though I have no doubt they would observe what was pointed out to them upon the former occasion,) that it is extremely improper that a paper, and more particularly a paper of this description, should be placed in the power of the parties so as to enable them to make a fac-simile copy; because it may very materially alter the paper itself; it may lead to the abstraction and the destruction of the instrument, because some time must necessarily be occupied in making a fac-simile copy of it upon the transparent paper which is used for the purpose; and, above all, I think it is very injurious to the purposes of justice, because it is impossible to suppose that a person who has seen the fac-simile copy, which evidently must be more stiff and formal than the original, can give a perfectly fair and unbiassed opinion. They say that the reason why they believe this is not genuine is, because it is more stiff and formal than

the handwriting of the deceased. It is impossible, therefore, that persons that had such fac-simile copies exhibited before them, being necessarily different in appearance from the original itself, having that first impression made upon their minds, could come forward to pronounce a fair and unbiassed opinion upon the genuineness of the instrument upon which they were called upon to pronounce.

There is *Mr. Layton*, to whom I have already adverted; he has examined this paper very minutely—I do not go into the particulars of his evidence, but merely to state the substance of it—he says he considers this paper to be an imitation, one of the best imitations he ever saw. Here is a gentleman, equally skilled with others, who have been called upon the same side, who differ from him, and who have no hesitation in saying that they believe it to be, and I have no doubt they sincerely believe it to be, a genuine instrument.

What reliance can the Court place upon evidence of this description, arising upon a comparison of handwriting? What reliance also can be placed upon the evidence of witnesses who come also to speak to a comparison of handwriting, who come from the post-office or from the bank, and whose business it is, in the common course of their engagements, to assist in the detection or to endeavour to detect forgeries? Here are two or three gentlemen, produced from those offices, who declare this paper to be a forgery in their opinion. There are other gentlemen of the same department who declare that they believe it to be a genuine instrument, and that they would have acted upon it in

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their several departments, if it had been presented to them, they knowing the general signature of the deceased. Where witnesses of this description differ, how can the Court act upon the evidence? It is impossible, therefore, to doubt the soundness of the principle laid down in this Court, that the comparison of handwriting is the most unsatisfactory of all unsatisfactory evidence to proceed upon. It only shows the fallacy of the grounds upon which gentlemen act in discovering forgeries and impositions, though, in the ordinary course of business, they may be sufficient to put the parties upon their guard against acting upon those signatures produced before them.

The only evidence produced upon this subject, upon which the Court would be inclined to rely, according to the principles to be observed in this Court, is the evidence of the witnesses who were acquainted with the manner and character of the handwriting of the deceased, from having seen him write upon more or less frequent occasions. But still this evidence is always liable to this objection, that it is, after all, mere matter of opinion, and it is proved by many witnesses in this cause, to whom the interrogatory has been addressed, that so closely may the handwriting of an individual be imitated that it may deceive, not only persons best acquainted with his usual character of handwriting, but it may even deceive the party whose handwriting it purports to be; and it is a reason why the Court should not have felt quite so satisfied with the bare examination of *Mr. Higham* and *Mr. Hitch* to the paper of the 2d of December, 1834.

Now the witnesses, as I have already stated, are

very numerous on both sides. They are almost equally numerous, having almost equal opportunities of seeing the deceased write, and thereby becoming acquainted with his manner of handwriting, and there is a great deal of difference of opinion between the witnesses. Here is *Mr. Higham*, who is examined upon the *condidit* to prove the handwriting of the deceased to the paper of the second of December, which he says he has no doubt is the deceased's. *Mr. Higham*, in answer to the twentieth interrogatory upon the *condidit*, says, in respect to this codicil which is shown to him, "I hardly know what answer to give when I am asked in whose handwriting it is; it is so like James Wood's, the deceased, that if it had been presented to me, without any suspicion previously excited, I should have acted upon it; but I have seen it twice before and examined it minutely, and I find some words in it so unlike his writing that I can scarcely believe it to be his, and yet I do not like to express myself so strongly as that; and the truth is, that I cannot say whether it is his handwriting or not, notwithstanding there are some discrepancies about it; part of the flourish of the letter J, in the signature, is so very unlike." He says it is so like in so many particulars that he does not like to say that it is not his. But why is this? Why, from the impression made upon his mind that this is a forgery; he has been called upon to discover discrepancies between the handwriting of the deceased and the paper exhibited, in order that he might pronounce that this is a forgery. But still he states that, with all his suspicions excited, he does not come to any other con-

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clusion than that it is extremely difficult to say whether it is the handwriting of the deceased or not. He says, that if his suspicions had not been excited, he should have acted upon it, and that is the way in which witnesses ought to come forward, without doubts being excited by the persons in whose behalf they are called upon to give evidence.

Mr. Fulljames I have already adverted to as one of the witnesses who cannot say that he does not believe this to be the handwriting of the deceased. He is called to prove that it is not. He had opportunities of seeing the deceased write, he became acquainted, therefore, with his manner and character of handwriting in a legitimate manner, and he says, that though there are discrepancies, which he points out, which lead him to doubt, though not entirely to disbelieve, that the codicil and the endorsement are the deceased's handwriting, yet the conclusion to which he comes is this, that it is a very difficult matter to say whether it is the handwriting of the deceased or not. And I think he is one of the witnesses who says, that he cannot dismiss from his mind the mysterious circumstances under which the codicil made its appearance, and, therefore, he has not given his opinion simply from the discrepancies in the character of the handwriting of this paper, as compared with other writings of the deceased, but from the circumstance of the mystery under which this paper made its appearance, which throws a doubt and suspicion upon it.

There are many other witnesses examined against this paper, who depose to their belief that it is not a genuine signature, for different reasons which they assign. But when the Court comes to ex-

amine the witnesses who are produced on the other side, they have no doubt whatever about this paper, and they are equally respectable with those upon the other side. Mr. Walker and Mr. Stanley, who, though they are connected with the corporation of Gloucester, and therefore might be supposed to have some interest in supporting the validity of this paper, are yet not disqualified as witnesses, are produced as witnesses upon this subject, and no objection is taken to them. They appear to have deposed in a manner which is entitled to the attention of the Court. There are the two Mr. Moores also, and the younger of those gentlemen has some doubt as to the endorsement upon it.

Then there is Mr. Poole; also Mr. Smith, to whom I have already adverted, as to the general character of the handwriting, who has expressed his doubts upon it, from the circumstance of the deceased having used figures upon this occasion instead of expressing the sums in the codicil given to the legatees by words at length; there is also Mr. Charleton. But there is another witness who comes from the same banking establishment as Mr. Higham, who had equal opportunities with Mr. Higham of being acquainted with the handwriting of the deceased, namely, Mr. Lawrence, who is a clerk in Sir John Lubbock's establishment, through whose hands the correspondence of the deceased passed, and who had also opportunities, upon some occasions, of seeing the deceased write and sign his name; and he states, that he has no hesitation in deposing to his belief that it is all in the handwriting of the deceased.

Looking then at this evidence in the cursory view

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of it, which is all that the Court, in these cases, can, by possibility, find itself called upon to take, it does appear to me that the result is at last to leave it as a matter of doubt—that the Court cannot safely and with security pronounce upon the question, either for or against the genuineness of the signature, where the witnesses differ so materially from each other. As I have already said, it is here mere matter of opinion—strong—undoubtedly it is very strong, for the affirmative of the proposition; and, as I said in the former case, if the Court were called upon, abstractedly from all other considerations, to pronounce for or against the validity of this codicil, upon the evidence of handwriting, I should feel bound to say that the great preponderance is in favour of the genuineness of the paper; but, fortunately, the Court is not at liberty to pronounce upon any such opinion.

Now, the probability of the disposition was referred to, as in the former part of the case. It is said, on the one hand, that the bequest to the city of Gloucester is extremely improbable, that he hated and detested the corporation of Gloucester, that though he was a member of the corporation, and was in the habit of attending their public meetings, he was treated with disrespect and neglect, that jokes were practised upon him, and that he entertained so decided an aversion to the members of the corporation, that it was the height of improbability that he should have left anything to that body. And then, with respect to charities, it is said that it was quite out of the question that he should ever have thought of giving anything to charities, his father having always told him that to

leave money to charities was making a nursery for rogues, for that they were always abused, and that he would never leave anything to charities. On the other hand, there is very satisfactory proof in this case, that he had occasionally made declarations of a different kind; that he had made declarations in favour of Gloucester—that he would do great things for Gloucester—that he had not forgotten poor old Gloucester—that he talked of building almshouses—that he talked of building a hospital—and it is in evidence, in such a manner as to leave no doubt of the truth of the evidence, that Mr. Daniel Smith had, in 1823 or 1824, or in the following year, seen a will of the deceased, by which he had in fact given a legacy of twenty thousand pounds for the purpose of endowing an hospital at Gloucester, but that the money was not to be paid until after the hospital had been built; but this, it is said, renders the story improbable, that a man should make such a bequest as this, to leave twenty thousand pounds for an hospital, and yet that the money was not to be paid till the hospital was built. But this shows how fallacious all conclusions founded upon such arguments as that are, for it does so happen that in that which is called the Will Book, there is a copy of a will of a gentleman of the name of Chetwynd, in the handwriting of the deceased, in the year 1824, by which he had left twenty thousand pounds for the purpose of endowing a hospital, and that the money was not to be paid till the hospital was built.

There is another circumstance arising out of the evidence of Mr. Smith, which is relied upon against the codicil. He states, that though he has no

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doubt as to the handwriting of the deceased, the bequest to the corporation of Gloucester does, in his opinion, make against the genuineness of the codicil, because he says he thought he had been slighted by the corporation of Gloucester. He declared that they had used him ill, and that they stood in their own light, and prohibited him from doing what he wanted to do for them; and, therefore, that leads Mr. Smith's mind to a conclusion that makes against the genuineness of the bequest in their favour. It is very true there may have been expressions of that kind; he may have been angry at the withdrawing of the custom of the corporation for supplying the Blue-Coat Hospital with clothing; and he may by possibility have absented himself from the meetings of this Blue-Coat School for some time; but then, by the books in his own handwriting, it appears, that upon several occasions he did, after these circumstances are supposed to have occurred, attend at the meetings of the corporation; almost all their dinners are recorded in his own handwriting, and the entertainment he met with there, and the articles of which the dinner was composed, of which he seemed to speak in many cases with great glee; and it is proved, beyond all doubt, that he did, in the year 1835, attend as an alderman of the city of Gloucester; that he rather took a pride in discharging the duties belonging to that office; and as to the slight of having been passed over as a mayor, it appears rather to have been at his own suggestion that he was passed over.

Then again Mrs. Whalley says, that in 1825 he talked of building almshouses, and said that he

should do great things for old Gloucester. Then in 1836, Mr. Hopkins says that he made a remark, "I have not forgotten poor old Gloucester."

I merely allude to these circumstances in a cursory manner, as they appear to me too slight to place much reliance upon them in support of the probability of this disposition, or as a recognition of the disposition in favour of Gloucester, as contained in this paper. They appear much too slight for the Court to act upon them with any degree of safety; but still less can the Court act upon the declarations which are supposed to be made by the deceased contrary to the intentions thus expressed in this codicil. They carry very little weight with them, they only show that he was a man of that character, extremely insincere in the declarations which he made, either for or against particular individuals; but certainly they remove all suspicion of the genuineness of this codicil, so far as that suspicion may be supposed to have arisen from the amount of benefit supposed to be given to the corporation of Gloucester.

With respect to charities, it appears by reference to these books, that he was a subscriber to a Lying-in-Charity; and that the deceased was not very exact in his orthography, for in entering the subscription to the Lying-in-Hospital, it is written "Lien-in-Hospital," which, therefore, removes any suspicion arising from his having spelt Mr. Counsel's name as he ought to spell the "Council Office" of Gloucester, and in this book it does most frequently appear that "Council Room" is spelt as the name of Mr. Counsel ought to be spelt, with the addition

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of an *l*; "Counsell" is the manner in which it is quoted in these papers.

Now with respect to the bequest to the city of Gloucester, is it improbable that, at so late a period of his life, extending to eighty years, he being a native of the city of Gloucester, he having made the greater part of his property in it as a tradesman and banker in that town, his father and grandfather having been inhabitants of that town for many years, is it at all improbable that he should have forgotten at the end of his life the little grievances which he supposed he had reason to complain of on the part of the corporation, and determined to give a part of his large property to that city, in order to relieve, in some degree at least, his fellow-citizens from the burdens which they had incurred from the improvements which had taken place in the city, by the opening of the canal, which seems to have plunged them into debt to a very large amount, and with respect to which an application was made, on behalf of the persons interested in that canal, the corporation or some of the trustees, by Mr. Alderman Wood, for an advance of money upon loan, but which the deceased declined to accede to, saying that he did not like water security.

Therefore I cannot consider that there is any great suspicion arising upon the genuineness of this paper from the bequest to the city of Gloucester. But after all, the probability of the disposition, in such a case as this, goes but a very little way in proving the act done. In those cases where the question is, whether the deceased was of sufficient capacity to execute the will, which is acknowledged

to have been executed by him, in all such cases the probability of disposition is important; but where the question is, whether the act propounded is the act of the deceased, the argument founded upon probability is of very little weight indeed, for it would be the most unsatisfactory of all reasoning, to come to a conclusion that a certain act has been done because it is not improbable that the act might have been done. The Court cannot act upon any such reasoning as that.

Then what are the probabilities with respect to the other legatees?

Mr. Phillpotts has a legacy of fifty thousand pounds, the intention of which, it is said, was to make up the loss he had sustained in a contested election at Gloucester. Mr. Phillpotts, it appears, had been for many years a very intimate friend of the deceased, and I do not think it more improbable that Mr. Phillpotts should be a legatee to the amount of fifty thousand pounds than that either of the gentlemen named in the paper of the second of December should have been a legatee. There is no ground of suspicion against the paper with reference to Mr. Phillpotts being a legatee, or to the sum given to him. Unfortunately, however, the declarations of the deceased, with respect to Mr. Phillpotts, are extremely vague and indefinite; showing, however, that if the deceased did make any future testamentary disposition of his property, it was very likely that he would be benefited by it.

As to his regard for Mr. Helps, there is little or no evidence whatever. Mr. Helps has pleaded that he is a relation of the deceased, and that he was on terms of intimacy with him; it is not denied that

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Mr. Helps used to go and see the deceased, who received him with kindness and attention, and I see no reason why the deceased should not have left a legacy of thirty thousand pounds to Mr. Helps.

With respect to Mr. Thomas Wood there is something more; he had a legacy of one hundred pounds, under the will of the deceased's sister, and the deceased acknowledged him as a relation, and he is stated to have said, he should not forget his relations.

As to Mr. Samuel Wood, it is in evidence, that the deceased inquired into the number of his family, and was told that he had six children; and it is a strong circumstance, that in the codicil there is a bequest of fourteen thousand pounds to Mr. Wood, and of six thousand pounds to his children, which would be one thousand pounds each; one of the strongest arguments in favour of the genuineness of the codicil, as respects the probability of the disposition; but there it ends.

Mr. Counsel was also a most intimate friend of the deceased, and, considering the intimacy which subsisted between them, and their families before them, a bequest of ten thousand pounds to him would be a very natural bequest.

It can hardly be doubted that the bequest to Mrs. Goodlake was a natural bequest; she was his second cousin; she was kindly received by him, and went to Gloucester to attend him, in April, 1836; so that it appears they were intimate. But this carries the case no further than a probability that there would have been a disposition in her favour, if the deceased had executed a testamentary act.

The question, then, on this part of the case is, whether these declarations, and the probability of the disposition, should impress the Court with a moral conviction, that this was the genuine act of the deceased, taken together with the evidence of handwriting: I am clearly of opinion that they are not sufficient for that purpose. It is very possible that the deceased may have intended to make such bequests, and yet did not do it. Again, if it be a fabricated instrument, it is probably the work of a person acquainted with the deceased's connexions, and (as it was observed by this Court, in the case of *Crysp and Ryder v. Walpole*), no person would set about fabricating an instrument without endeavouring to give the disposition some marks of probability; so that probability carries very little weight with it, when the question is, whether it be the act of the deceased or not.

The remaining question is as to the supposed destruction of the codicil recited in the paper propounded. The suggestion is, that the codicil was destroyed after the death of the deceased, or during his lifetime, by some persons who had access to his repositories; and it has been pretty strongly thrown out, that it was done by the executors, or by their direction. But, supposing the facts to be so strong as to lead to a plausible suspicion that such an act has been done, suspicion is not a sufficient ground for the Court to hold, that a paper had been destroyed, of whose existence there is no evidence whatever. But suspicion, in this case, does arise out of the answers of the executors to certain articles of the allegation; for, it is admitted by Mr. Chadborn, that a paper was destroyed by

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him, in the presence of Mr. Phillpotts, and under his advice; that it was a useless paper, and might be put in the fire; that is as Mr. Chadborn states; whether it be the fact or not is another question. But must not the bare destruction of such a paper create great suspicion in the mind of the Court, especially where the parties have not conducted themselves with good faith in other parts of the transaction? What security can the Court have that the paper was of the description Mr. Chadborn has given of it,—“a memorandum, to the effect that he (Mr. Chadborn) was to take possession of his deeds, and manage his concerns after his death,”—and that it did not contain any bequest, or gift of any property of the testator, to any person whatever, or appoint any executors? How is the Court to be satisfied that it did not contain a disposition of any property, or an appointment of executors, or that it was not a will of a later date, or some codicillary disposition? It is quite impossible that the Court can take it, on the answer of Mr. Chadborn, that it was such a paper as he has described. The facts are not pleaded by the executors; but they observe a studied silence till their answers are given in. Had the facts been pleaded, Mr. Phillpotts might have been called upon to give in his answers, and we should have had the benefit of his account of the transaction, and have heard from him the advice he gave, and the nature of the papers. If he did give such advice (and I take it upon the answers of Mr. Chadborn and Mr. Osborne that he did), I think he must have known, and Mr. Chadborn must have known, that such papers ought not to have been destroyed, even

before the swearing of the executors. Neither Mr. Phillpotts nor Mr. Chadborn could be so ignorant in their profession as not to know, that, in the absence of other documents, this paper might, and I have no doubt from the description given of it would, have constituted Mr. Chadborn executor, according to the tenor, so far as related to the estates; and if it had been before the Court, it might have explained certain circumstances stated in the evidence, as to Mr. Chadborn's having the management of the estates; and the observations made by the deceased to different tenants, that all would be "his Honour's," and "his Honour knows all about it." I cannot, therefore, help saying, that there is a considerable degree of suspicion attaching to the conduct of Mr. Chadborn; at all events, he acted very indiscreetly, in following the advice of any person in destroying that paper.

Then is there no suspicion attaching to Mr. Chadborn, with respect to his visit to the house of the deceased on the morning of the 21st of April? When his answer on this point was objected to, as not sufficiently explicit, the objection appeared to me somewhat hypercritical; and it shows how careful the Court should be in forming an opinion as to the relevancy of objections at an early stage of a cause, by those who are more intimately acquainted with the circumstances than the Court can be. The Court, however, did call for a more specific answer; and when his answer, stating that he was at the house "at eight o'clock," was objected to as insufficient, and he was required to answer whether he had been there "before eight o'clock," in his

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further answer, he says that he “was there at eight o’clock, and not before ;” so that there could be no excuse on the ground of inadvertence. Now, what is the evidence on this point? Three witnesses, whose evidence the Court has no reason to disbelieve, have sworn that they saw Mr. Chadborn go into the house at between six and seven o’clock in the morning ; and Ann Lewis, their own witness, on interrogatory, says, that he was there at seven o’clock in the morning, and not (as Mr. Chadborn states in his answer) to communicate with Mr. Osborne and Mr. Surman respecting the funeral, or any such purpose ; for she says that, when he came there, Mr. Osborne and Mr. Surman were not up. What passed on that occasion, it is not possible for the Court to conjecture ; but when a party has his attention drawn to a fact, and he is specifically called upon to declare whether he was there before eight o’clock or not, and he says that he was there at eight o’clock, and not before, it does create a suspicion that he was there for a purpose that will not bear to be disclosed. What that purpose was the Court has no means of ascertaining, but it is a circumstance which, with others, leads to a suspicion that a paper may have been destroyed by him at that time, of a testamentary character—either this codicil, or some other paper.

Again ; there is another circumstance which throws a certain degree of suspicion upon the executors, which is this : Ann Lewis and Ann and Maria Nicholls, who were in the deceased’s house, are pleaded to have been cognizant of, or had reason to believe the fact, that the deceased had executed testamentary papers of a later date than

those of the 2d and 3d of December; that they knew who the person was who sent the paper to Mr. Helps, and had rescued it from destruction, and that they were aware that a paper of a testamentary nature had been burnt since the death of the deceased. Generally speaking, it is the duty of persons who vouch witnesses to produce them; but that the legatees should not have produced these witnesses, who were in the custody of the executors, and with whom they had no opportunity of communicating, except in the presence of an agent, of the executors, is not very extraordinary. But when an imputation was thrown out against the executors, of having destroyed testamentary papers, or of knowing such papers had been destroyed, after the death of the deceased, and persons in their employ were able, if such a transaction had taken place, to give an account of it, or if not, could negative the fact, as far as their knowledge went; it does appear to me a most extraordinary circumstance, that, with a view of relieving themselves from such an imputation, they should not have produced these persons. Why should they be content with answering upon oath that they knew or believed that no such transaction took place? What had they to apprehend from the cross-examination of such witnesses? When these witnesses are not called to disprove the charge, does it tend to remove suspicion? It tends in some degree to strengthen the suspicion sought to be attached to these parties, that they have not produced these persons, and subjected them to cross-examination. If they had nothing to disclose, there could be no danger of their saying anything

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prejudicial to the interests of the executors. And more especially the Court cannot think that this conduct has the effect of removing suspicion, when it calls to mind the endeavours made to prevent the cross-examination of the witnesses on the *condidit*, by the legatees in the codicil, which brought out such important facts.

These are circumstances, I say, which lead to suspicion ; but they lead to nothing more ; they do not establish the fact, that a paper of this description was executed by the deceased, or that it was destroyed by these parties. And the question in this part of the case is not between the executors (whose conduct is impugned) and the legatees, but between the legatees and the next of kin, who were no parties to any of these proceedings, and who cannot, therefore, be prejudiced by their acts, unless the actual destruction of the paper can be brought home to the executors.

Now, looking at all the circumstances of the case, though the evidence in affirmance of the genuineness of the paper, as far as handwriting is concerned, is extremely strong ; so strong, that if I were bound to pronounce whether it was or was not the handwriting of the deceased, I should have little hesitation in saying that I believed it to be his handwriting ; yet it is impossible for the Court to pronounce a judicial opinion upon that ground alone. I am also of opinion in favour of the probability of the disposition contained in the paper ; but probability, coupled with the evidence of handwriting, is not sufficient to enable the Court to pronounce judicially that the paper is proved to be the act of the deceased. I, therefore, pronounce

also against the validity of the paper of July 1835, which is propounded by the legatees as a codicil.

There is a further part of the case, and that is the question of costs. Generally speaking (I now refer to the codicil), persons who undertake, for their own interest, to establish a paper of this kind, if they fail, are liable to the costs of those to whose prejudice the paper is propounded; and although I entirely acquit Mr. Helps, and the other legatees who have propounded the codicil, of any participation in the fabrication of the paper (if it is a fabrication), or of any knowledge of the fabrication of it, yet that would not have prevented the Court from following the precedents in other cases. But there are very peculiar circumstances in the present case, which induce the Court not to adhere to these precedents. But for the propounding of this paper, the will of the deceased would have been pronounced to be contained in the papers of the 2d and the 3d of December, 1834; and it is more than probable that, but for the production of this paper, the executors named in that of the 2d of December, would now have been in possession of the property of the deceased, to which the Court is of opinion they are not entitled. It is, therefore, through the agency of these gentlemen that the case is brought (so far as the decision of this Court goes) to the present conclusion, that the parties entitled to the property are the next of kin of the deceased, who are now put in possession of rights, which they would otherwise have lost. Against these parties, therefore, it is clear that Mr. Hitchings cannot press for costs. The executors cannot press for their condemnation in costs, because their

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own case has not been established, and it is through the agency of the legatees that their case has been disproved. Mrs. Goodlake might press for costs, because she opposes the codicil as well as the will; but when I look at the part she has taken, nominally opposing the will, but endeavouring by all the means in her power to obtain for the executors a sentence in favour of it, I think she is not entitled to have her costs paid by the parties who have propounded the codicil. As against these parties, therefore, the Court does not think itself called upon to pronounce anything as to costs.

But a further question arises as to costs, with respect to the executors. They have propounded two papers, as together containing the will of the deceased; they brought them forward in a shape which they were not entitled to assume, for the purpose of facilitating the obtaining probate, and which, if obtained, would probably have had the effect of preventing any persons from questioning the validity of the will. The executors having failed in establishing their case, and having brought it forward under such circumstances, the Court would be bound to condemn them in costs; but the difficulty is, in whose costs are they to be condemned? The legatees have failed in establishing their paper, and Mrs. Goodlake has supported the case they set up, and it is not asked that the executors should be condemned in her costs. The only party, therefore, who would seem entitled to costs, as against the executors, is Mr. Hitchings; and the Court sees ground on which, for the sake of public justice, and for the prevention of such experiments for the future, it should condemn these

parties in the costs occasioned to Mr. Hitchings,—not in order to reimburse Mr. Hitchings, because, under the sentence of this Court, he will be put in possession of a considerable sum of money—but to mark its disapprobation of the manner in which this case has been brought forward, and probate endeavoured to be obtained by a suppression, if not a misrepresentation, of facts. I am, therefore, of opinion that the justice of this case will not be satisfied, unless I pronounce that the parties who propounded the papers of the second and third of December, 1834, are condemned in the costs which Mr. Hitchings has incurred by his opposition to these papers; and I therefore condemn the executors in the costs of Mr. Hitchings.

The Court is aware of the great responsibility which a case of this description, involving interests to such an immense amount, imposes upon it. I have endeavoured to form an impartial opinion as to the real merits of the case, and I have bestowed my best attention upon it.—I have endeavoured to do my duty conscientiously between the parties; and I have the consolation of knowing that, if I have failed, there is a tribunal to which the parties may resort, and to which in all probability they will resort, whose decisions are much more satisfactory, as coming from the eminent persons of whom it is composed, than can be the opinion of any single judge, far less the humble individual who sits in this Court to dispense justice as far as he can.

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A suit for restitution of conjugal rights being commenced by the wife, the husband pleaded her adultery in bar, and prayed a separation; the wife then charged the husband with adultery, and prayed a separation. The Court being of opinion that the wife had been guilty of very gross adultery, and that the husband's adultery with one person long anterior had been fully condoned, pronounced for a separation, at the prayer of the husband.

THE proceedings in this case commenced by a suit for restitution of conjugal rights, by Mrs. Anichini against her husband, who, by way of answer, set up a charge of adultery against the wife with two persons, namely, Wm. Ayling, in 1835, and with Henry Morton in 1836. The wife then charged the husband with adultery with a Madame Malenchiné, in 1825, and with her servant Ann Bishop Blake, in 1831; and she pleaded that the former adultery did not come to her knowledge until after the proceedings in this cause had commenced. The husband expressly denied the adultery with Malenchiné; he admitted that with Blake, but alleged that it had been condoned by Mrs. Anichini.

The *Queen's Advocate* and *Addams* for Mr. Anichini.

The adultery of the wife is fully established in proof. The alleged adultery of the husband with Malenchiné is not only not proved, but is disproved: the adultery with Blake is admitted, but that was condoned by the wife, with a full knowledge of all the facts, and the parties cohabited together afterwards, and the wife even commenced

this suit for restitution of conjugal rights. Condonation is a conditional forgiveness of everything known that had previously passed. If the husband offends again, the former adultery revives; but it never can be contended that the condonation of an act of adultery is to operate as a bar to the husband's remedy against an offending wife; that it is to be a license to her ever afterwards to commit the same crime. Can the wife say, "I forgive you, but I am now at liberty to commit adultery when I please, and you can have no remedy?" Such a doctrine would be extremely injurious to society, and can never be upheld by the Court.

As to the effect of condonation, where both parties have been guilty of adultery, they cited *Sanchez de Matrimonio, lib. x. disp. 7, s. 1.*

Burnaby and *Curteis* contra. Submitted first, that there was not sufficient proof of the wife's adultery, and that the condonation amounted to nothing, as Mrs. Anichini had not a complete knowledge of the whole misconduct of her husband, it being now proved that he had in addition to the adultery with Blake, also committed adultery with Madame Malenchiné. In order to effect condonation there must be full knowledge of all the misconduct, *Durant v. Durant* (a). But secondly, supposing it to be proved, as is contended on behalf of the husband, that Mrs. Anichini has been guilty of adultery, and that there has been a complete condonation of his adultery, still the conduct of Mr. Anichini is such, that the Court will not grant a

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separation at his prayer. In *Beeby v. Beeby* (a) Lord Stowell refused to grant a divorce at the suit of a husband who had himself been guilty of adultery, although his adultery had been condoned by the wife. Independent of his adultery, the conduct of the husband here is such as to amount to connivance. He has, indeed, given his wife license to do as she pleased, and the rule *volenti non fit injuria* applies to him. There are four witnesses who depose to declarations by the husband, that Morton might take Mrs. Anichini away and intrigue with her where he pleased, provided he did not do it in Anichini's house.

Coupling this with what is admitted in answer to the 17th interrogatory, by Agnes Templeton, a witness produced by Mr. Anichini, the Court will not grant the husband's prayer. She is asked whether Anichini did not declare that he was not the father of Mrs. Anichini's children, and that as to Frederick the youngest that Mr. Singleton was his father. She answered, "he did not say that he was not their father." "But now that the conclusion of the interrogatory is put to me respecting the youngest boy Frederick, it does bring to my mind that I have heard the producent express himself to some such effect as suggested, not in the very words suggested, but to some such effect. When they lived in Wells-street he has said he had his doubts about Frederick, whether Singleton was not his father. I do recollect that Mrs. Anichini had gone to France, and met a person of that name there; and a temporary separation took place be-

(a) 1 Hagg. E. R. 789.

tween the producent and ministrant, and it was after their reconciliation that this boy was born, but in their subsequent quarrels the producent certainly said as I have deposed."

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JUDGMENT.

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Before considering the question of law, which may arise in this case, I must first ascertain what the facts are to which the legal principles are to be applied. (The learned Judge having considered the evidence, was of opinion that Mrs. Anichini had been guilty of gross and barefaced adultery—that both charges were fully proved—that the adultery alleged to have been committed by the husband with Malenchiné was not proved, and that the adultery with Blake (which was admitted) had been completely condoned.) He then proceeded:—But it was said that the husband had given the wife license to commit adultery; now such a case, if proved, would on the well known principle of law, *volenti non fit injuria*, be a bar to any separation at the suit of the husband. There are certainly expressions used which are of this tendency; but looking at the whole *res gestæ* of the case, the sort of affection, though somewhat strange, and the jealousy of Mr. Anichini, I cannot think those expressions amount to any proof of the husband's sanctioning the adultery of his wife. There are circumstances, I must admit, which make it probable that he was too forgiving a husband, but to bar relief in such a case there must, I think, be a clear collusion or connivance. To say that adultery with Mr. Singleton had been proved, and connived

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at or forgiven, however probable the fact might be, would be assuming as proved that which is not proved.

The case then comes to this, and it is a point which I do not find has been directly decided, whether a husband having committed adultery, which has been condoned by the wife, is debarred by such a circumstance from obtaining a divorce from a guilty wife. *Dr. Nicholl* has been kind enough to give me an opportunity of perusing the notes of *Dr. Arnold*, relative to two cases, *Raibould v. Raibould* (a), and *Kirby v. Kirby* (b), which, though decided by the same learned Judge (Sir William Wynne), do not exactly cohere, and afford little assistance or light in the present question (c).

(a) Cons. 1788.

(b) Arches, 1801-2.

(c) *Dr. Arnold's* notes of these cases are to the following effect:—

Raibould v. Raibould.—Consistory, 27th Feb. 1788.

The suit commenced with a citation for restitution of conjugal rights on the part of the wife against the husband: the husband pleaded the wife's adultery as a bar to her suit, and prayed a separation; an allegation was now offered on the part of the wife, charging the husband with adultery, and praying a divorce.

Dr. Scott objected to the admission of this allegation, on the ground of its being inconsistent with the citation.

Per curiam (Sir William Wynne). The citation was for restitution of conjugal rights; an allegation in bar was given by the husband, and a separation prayed: though not regular, it is held that a sentence may be given for separation. But on the recriminatory allegation, if the husband fails in proving the wife's adultery, and the wife proves her recriminatory allegation, what sentence shall the Court pronounce? I must decree restitution: this is inconsistent. It is impossible to give such an allegation in this state of the case.

Kirby v. Kirby.—Arches, 7th July, 1801.

This was originally a suit by the wife for restitution of conjugal rights: the husband pleaded adultery by the wife in bar; an allega-

In *Beeby v. Beeby*, (a) and *Dance v. Dance*, (b),
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tion was now offered by the wife, denying her adultery, and recriminating.

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Sir John Nicholl opposed the admission of this allegation as to the recriminatory part as follows:—Such a charge in such a suit is not admissible; it would be strange to engraft a recriminatory charge in such a case. Where there is an original suit brought by the husband for adultery she may deny it, and say, therefore, that the husband is not entitled to a separation, or may say if I am guilty you are also, and therefore not entitled to a separation; but here it is inconsistent: she first prays restitution; the husband charges her with adultery; she denies it, and charges him with adultery; and what does she now pray?—separation. If she confesses the charge it may be consistent to recriminate, and say, therefore, we may live together. I am not aware of any precedent, and it is contrary to principle.

Dr. Swabey on the same side. The wife cannot change the issue; she must drop her suit for restitution, and then plead the adultery, but not while continuing this suit. Against a suit for divorce by reason of adultery by the husband, it is relevant for the wife to plead his adultery, as it creates a bar; but in such a suit as this it is not, as it does not apply to the issue before the Court.

Dr. Laurence in support of the allegation. It is possible that the allegation of the husband may not be proved; there would then be an end to his bar. He has changed the issue and prayed separation; on what principle may not the wife plead *adultery coming subsequently to her knowledge**, to obtain ultimately a sentence on that ground, in nature of reconvention—if both fail in proof the original suit remains.

Dr. Croke.—No case has been adduced to shew that recrimination may not be pleaded; any responsive plea destroying the assertions of the husband is admissible.

Sir William Wynne, after some observations as to the six first articles, proceeds:—The seventh introduces charges of adultery against the husband: this is, undoubtedly, a very singular case, and I cannot say that I remember anything like it. The suit is for restitution of conjugal rights; adultery is pleaded by the husband in bar,

* The Editor has had an opportunity of examining the original allegation in the Registry of the Arches Court, but there is no averment therein to this effect.

(a) 1 Hagg. E. R. 789.

(b) 1 Hagg. E. R. 794. n.

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condonation ; but in both cases Lord Stowell held the fact of adultery not proved, and after consider-

which is usual ; the issue is changed, and there may be a fallacy in the argument, to take it, as if the husband prayed only not to receive his wife, but he prays also separation, and she pleads *compensatio criminum* ; the husband would be entitled on proof of his allegation to a sentence of separation, to this the wife is not bound to submit ; she may follow where he leads. It is not a condonatio to bring a suit for restitution,—suppose both fail, she may repeat her original prayer, it is not, therefore, entirely inconsistent with her original prayer. Suppose she proves adultery against the husband, she is not obliged to pray separation, and he could not set up his own adultery in bar. If both prove adultery, it is not necessary to say now what would be the consequence, perhaps the Court might say it would give no sentence. I apprehend the wife has a right, being led to it by the allegation of the husband charging her with adultery, to charge adultery against him, what may be the effect, is for future consideration.

The cause afterwards came on for hearing, and on the 19th of July, 1802, Judgment was given to the following effect ;—

Sir William Wynne.

This is a suit for restitution, commenced in the archdeaconry of Berks, by Anne Kirby. A libel was admitted, and witnesses examined : an allegation was offered by the husband, charging adultery, and praying a separation : three articles were rejected, and the rest admitted, from that there was an appeal on both sides, to the Court at Salisbury, where the whole was admitted, there was then an appeal to this Court, which affirmed the sentence, and retained the cause. An allegation was afterwards admitted on the part of the wife, charging the husband with adultery, and an allegation exceptive to the witnesses examined by the husband, (the learned Judge having gone minutely through the evidence, was of opinion that the allegation charging the wife with adultery, was not proved, and then continued,) “ But she gave an allegation, pleading adultery by the husband. That was admissible, I think, under the circumstances of the case, as it then stood : he had given an allegation pleading adultery, on which there might be separation : a sentence of separation is often given in such suit of restitution, on such a plea ; against this the wife might set up adultery by the husband, without admitting the fact against herself, pleading as in bar, or by recrimination. But that, the husband failing in proof of her adultery, the wife can obtain *separation* in such a case on *such* plea, is what I have never heard. Condonation extinguishes adultery, the wife brings her suit for restitution, on having gone to the husband’s house, and been rejected ; it cannot be stronger, there may, possibly, be cases where the wife

ing those cases with great care, it appears to me that Lord Stowell had not made up his mind on the question ; it was not necessary he should do so ; I do not, therefore, say that he evaded the point ; he was not called upon to decide it, and he did not. In *Beeby v. Beeby*, he says : “ What is the effect of condonation ? In general, it is a good plea in bar : it is not fit that a man should sue for a debt which he has released ; but here the plea in bar is *compensatio* ; and condonation is not in bar of the action, but a counter-plea. Here the wife does not pray relief, but prays to be dismissed. It does not follow that the same act, which will bar the remedy, will operate on the other side, and unless it is an universal rule, that whatever is a plea in bar, and disables a party from bringing the suit, likewise destroys the defence, the present attempt cannot avail the husband. A man, it is true, who has forgiven adultery, cannot bring a suit ; but when he complains of his wife, will her forgiveness of his previous misconduct make him a proper person to receive the sentence of the Court ? If both are equally guilty, will her condonation make him

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might so obtain a separation, if the fact of adultery took place after the suit was commenced, or came to the knowledge of the party after, but that is *not* this case,” (the Judge then considers the evidence as to the charges made in the wife’s allegation, and concludes,) “ I think the husband has clearly failed in proving adultery, and that the wife has likewise failed ; What is the Court to do ? The party might have reverted to the suit and prayer, originally made ; but she does not so pray ; * therefore, having reconvened each other, and she not so praying, and the party so declaring, she will proceed no further in that suit, the Court can do nothing but dismiss both parties.

* Dr. Arnold adds this note :—

It was declared by special proxy, now exhibited on the part of the wife, that she would not pray restitution.

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rectus in curia, and enable him to procure a sentence?" Lord Stowell here raises the point directly in question;—does he solve it? "There may be cases," he continues, "where a wife may, by forgiveness, by cohabitation, by the reformation of her husband, be so barred, that an obsolete fact shall not be a defence. This bar would not, however, be effected so much by condonation, as by the general state between them of the consequent impossibility of reviving former follies," &c. I regret that it falls to my lot to decide what is to be done.

If I were, though I think it would be unjust to Lord Stowell, to draw an inference solely from his language, it appears to have been the impression of his mind, that, where a husband has committed adultery, which is condoned, and the wife commits adultery, he would not be able to obtain a separation: that would seem (if I look to the words only of Lord Stowell) to have been the bearing of his mind. But we must not look at his words without reference to the facts and circumstances of the case; he was speaking of a case in which there was repeated misconduct on the part of the husband, and he says, that cases might arise in which he might come to a different conclusion.

It is difficult and dangerous to attempt to lay down any general rule; but I cannot go the length of saying that the adultery of the husband, followed by condonation, would debar him from a remedy against his wife, under any circumstances which I can suppose. Take the case of a husband who had been guilty of adultery ten or twelve years before his wife's misconduct, under circumstances which might render it comparatively venial; that the wife

was fully aware of the adultery, had condoned it, had continued to live with him, and had had children by him; that, ten or twelve years after, she is guilty of adultery herself,—would it be consistent with any principle that, under these circumstances, the husband should be entitled to no remedy at all? On the other hand, there is no doubt that, in a case like *Beeby v. Beeby*, where the husband, after his offence is once condoned, repeats it, and shows himself utterly regardless of the marriage-vow, he does not come into Court with clean hands, or anything like clean hands. It would, as the *Queen's Advocate* observed, be dangerous to hold, as a general principle, that a wife, having condoned the adultery of her husband, should thereby be placed in such a situation that she might commit adultery herself without her husband having any control over her. I next look at the consequences of such a principle of law. If a husband be not entitled to a separation from his wife, he is bound to cohabit with her, and how difficult would it be to enforce such a principle of law! I know no authority which states, that, whatever be the guilt of both parties, if the Court does not pronounce for a separation, they are not, according to the law of this country, bound to live together; and I think such a principle would be dangerous to society, and to public morals.

Where a condonation has taken place with a full knowledge of the facts, it is said to be a conditional forgiveness. Conditional on what? On the future conduct of the husband. Suppose he fulfils the condition, and never after violates the obligations of the marriage-bed, is the condonation to have no

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other effect than to bar a suit against him? I think the effect is to make him *rectus et integer*, except that his past transgression may be revived by subsequent misconduct.

I, therefore, have come to the conclusion that, under the circumstances of this case, I am bound to grant the husband the remedy he prays; and the last point in the case is what that remedy should be.

The adultery of the husband occurred in 1831; so far as appears, from all the evidence in the cause, the husband never, otherwise, deviated from his marriage-vow, nor broke its obligations in any instance but this: so that it is the case of adultery with a single person. It was several years antecedent to the adultery charged against the wife, and it is proved to have been forgiven at the time it was committed. I think I am bound to say that this was the only adultery, and to divest the case of all other circumstances. I must not trust my mind to go into the circumstances of the affair with Mr. Singleton; because if that elopement had been proved, and the forgiveness of the wife's adultery by the husband had been proved, I should be of opinion that that circumstance, coupled with his own adultery, would disentitle him to a remedy. Considering that the wife's condonation of his adultery with one person was several years antecedent to her adultery, which was as gross, profligate, and abandoned, as in any instance which has ever come under the consideration of the Court,—she, the mother of five children, carrying on a criminal intercourse with a young man, twenty-four or twenty-five years of age, cohabiting with him in the house where her husband was living with her,

during part of the time, and then going off with him,—I think, under all the circumstances, I am bound to pronounce for a separation, and to pronounce it at the prayer of the husband.

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PREROGATIVE COURT OF CANTERBURY.

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WALTERS *against* METFORD.

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THIS was a question as to the execution of a will by a married woman, under the following circumstances :

The deceased, Mrs. Hannah Nickleson Watson, married in 1823, when the sum of 2000*l.* Bank stock was settled upon certain trusts during the life of herself and her husband, and upon the death of the survivor, &c. “ upon trust for such person or persons for such ends, intents, &c. as the said Hannah Nickleson Watson at any time or times, and from time to time, notwithstanding her said intended coverture by any deed, &c. or by her last will and testament in writing, or any writing in the nature of or purporting to be her last will and testament, &c. *to be signed and published* by her in the presence of two or more credible witnesses, shall direct or appoint.”

Shortly after the marriage, namely, on or about the 10th of May, 1823, the deceased proceeded with her husband, Lieutenant-Colonel Samuel Watson, to the East Indies, where she died, on the

A power in a married woman to dispose of certain property by will, to be signed and published by her in the presence of two witnesses, is not duly exercised by a paper purporting to be signed and sealed as a will, in the presence of two witnesses, omitting to state in the attestation clause that it was published ; but as the power did not require that the will should be attested, parol evidence was admitted to shew that publication had taken place ; the evidence, however, on that point being insufficient, the Court pronounced against the paper.

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9th of July, 1837, leaving her husband surviving, who died on the 19th of February, 1838. Previously to her departure, some time between the 13th of March and the 10th of May, 1823, the deceased signed the will propounded, which was to the following effect :

“ I, Hannah Nickleson Watson, leave to my beloved husband, Samuel Watson, the whole and sole power and control over all I possess, or have it in my power to leave by will.” The will then went on to give certain legacies, and concluded—“ and I request the said James B. Coles, with my brother William Metford, will see this my last will and testament duly complied with.

“ HANNAH N. WATSON.

The
 Seal.

“ Signed and sealed by the said Hannah Nickleson Watson, in presence of us, who at her request, and in her presence, have subscribed our names.

“ SAM. COMPTON, Winchmore Hill, Middlesex.

“ WILLIAM SANSUM, 139, New Bond-street.”

The whole of the will and the attestation clause were in the deceased's handwriting, and it was pleaded in the allegation propounding the paper, that “ the deceased did set and subscribe her name thereto, and did seal and publish and declare the same as and for her last will and testament, in the presence of divers credible witnesses, two of whom, at her request and in her presence, and in the pre-

sence of each other, set and subscribed their names as witnesses thereto, all in manner and form as thereon now appears."

This allegation was opposed, and it was contended that the will was not duly executed, as it did not appear upon the face of the instrument that the terms of the power had been satisfied, and that parol evidence in such a case was not admissible; but the Court being of opinion that, as the power did not require that it should be *attested*, that the will was signed and published, parol evidence was admissible, and admitted the allegation; and the surviving attesting witness (with three others) was examined, but he could not remember any words of publication, and could only depose to a belief that at the time of execution Mrs. Watson placed her finger on a seal affixed to the said paper, "such" he said "is my present belief; but it is an event of so long time ago that I cannot undertake to depose more accurately; and on interrogatory he said that at the time of the execution of the paper he did not know what was the nature of the paper he attested, and that not knowing that Captain and Mrs. Watson were at the time of executing such paper about to proceed to India, he had taken up the idea that the said paper was a power of attorney. "But" he continued:—"I had no ground for believing so, it was merely an idea of my own. I will not swear that Mrs. Watson did in my hearing publish and declare the said paper writing as her will."

The other witnesses could not depose upon this point.

Burnaby and Addams, in support of the paper,

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contended that there was sufficient to shew that publication had taken place ; that what would be equivalent to publication under the statute of frauds would suffice here, and they cited *White v. The British Museum* (a).

Phillimore and *Addams* contra, cited *Allen v. Bradshaw* (b), and *George v. Rielly* (c).

JUDGMENT.

SIR HERBERT JENNER.

The paper, on the face of it, does not say that it was *published* in the presence of the witnesses, and the question is, whether the evidence is sufficient to prove that the power was duly executed? I should be inclined to hold that delivery was equivalent to publication ; is there, then, evidence of delivery? The surviving attesting witness cannot depose to any words of publication, he can only speak to his belief that the deceased placed her hand upon the seal at the time of execution. He did not hear the paper called a will, and his impression was that it was something else. The other witnesses carry the proof no further. Possibly the witness's memory may fail him, but the onus of proof is on the party who propounds this paper, and I am of opinion that the evidence is not sufficient to shew that the will was published by the deceased, in conformity with the terms of the power, I therefore pronounce against it.

(a) 6 Bingham. 310.

(b) Vol. 1, p. 110.

(c) *Ante*, p. 1.

DURLING and PARKER against LOVELAND.

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THIS was a business of proving the will of Francis Petworth, a publican, of Chiselhurst, Kent, who died on the 7th of April, 1838, a widower, without children, aged 76, leaving property to the amount of about 1850*l*. The will was propounded by the executors, and was opposed by Charlotte Loveland, the niece, and only next of kin of the deceased.

The will in question, which was dated on the 8th of March, 1838, and was executed in due form, purported to give the whole property, real and personal (there being a small real estate, but the bulk of the property being in the public funds) to the executors, in trust, to pay three annuities of 10*l*. each, to Mary Cross, who had been the deceased's housekeeper from the period of his wife's death, about twenty years back; to John Jupp, the brother of the deceased's wife, and who had been employed by him for many years as ostler, till he became incapable of work; and to the widow of his deceased brother, to whom he had given that sum annually since her husband's death; the remainder of the property, real and personal, was left to the two executors, Mr. John Durling, the landlord of a public-house at Bexley, a friend of the deceased, and Mr. John Frederick Parker, a solicitor (the drawer of the will), a partner in a firm at Lewisham, in Kent, this firm having been on former occasions employed by the deceased.

The will of an aged person of doubtful capacity prepared by a solicitor, who was appointed an executor and one of the residuary legatees, pronounced against, and the parties propounding it condemned in costs.

Bare execution in such a case is not sufficient.

The principles of law applicable to such cases.

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The *Queen's Advocate* and *Phillimore* supported the will, which was opposed by *Haggard* and *Jenner*, for the next of kin.

JUDGMENT.

SIR HERBERT JENNER.

Before I consider the circumstances of this case, connected with the preparation of this paper, it may be necessary to allude to a question which arises in this case, and in all cases where the drawer of a will takes a benefit to a very considerable extent under it, that is considerable with reference to the amount of the property which is the subject of the disposition.

In the argument addressed to the Court by the *Queen's Advocate*, in support of the paper propounded, its attention was called to a recent judgment of the Judicial Committee of the Privy Council, in the case of *Barry v. Butlin* (a), in which it became necessary for that Court to consider the doctrine and principles to be acted upon with reference to the circumstance I have stated, where the drawer of a will takes a considerable benefit under the instrument. It would seem that in that case the doctrine with reference to this point had been carried, in argument, to a somewhat larger extent than their Lordships were inclined to assent to, and it was proper, therefore, to ascertain the real doctrine and principles to be acted on; and *Mr. Baron Parke*, in his judgment, takes care to state with great accuracy and precision the principles which ought to be followed. But I

(a) Vol. 1, p. 637.

must say, that, in reading that judgment, though I accede to every one of the doctrines and principles laid down in it, I am not aware that this Court has ever acted on any other or different principles; that it has ever held that, in any individual case, or unless where the particular circumstances of the case require it, where the drawer of a will takes a considerable benefit under it, he was bound to do more than shew that the deceased had a knowledge of the contents of the will; it never has been the doctrine of this Court that it is necessary in all cases to prove that the will was read over to the deceased, or that it was drawn from instructions given by him. It never was the doctrine of this Court, whatever may have fallen from this chair, that, without reading over or without instructions, it is impossible to pronounce for such a will. I never understood the doctrine of this Court to go beyond this, namely, that it is a circumstance which should awaken the vigilance and jealousy of the Court, to watch and see whether, by some means or other, a knowledge of the contents was brought home to the deceased, or it was shewn that it was the intention of the deceased to make such a disposition of his property, which the Court would accept as sufficient proof, notwithstanding that the drawer of the will took a considerable benefit under it. I do not apprehend that there is any technical rule which requires proof that a will has been read by or to the deceased, or that it was prepared from instructions given by him. Even in *Paske v. Ollat* (a), it was not laid down that such

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proof was necessary ; but if the Court was satisfied that the instrument did contain the real intentions of the testator, although there was no proof of reading over, and no proof of instructions, it would grant probate of it.

Nothing can be more clear and distinct than the law as laid down by *Mr. Baron Parke*, as to the doctrine and principles applicable to cases where any person, solicitor or not, draws a will, under which he takes a benefit,—that, generally speaking, it is a circumstance of suspicion, greater or less, according to the circumstances of the case,—namely, the capacity of the deceased, the amount of the legacy given to the drawer of the will, the amount of the property to be disposed of, and the claims which different individuals had upon the testator ; and it is with reference to these principles that the Court proceeds to consider the circumstances of this case ; and I again say, I do not understand that there is any difference between these principles and those which have been acted upon in this Court.

Now in this case the property amounts to about 1800*l.*, out of which annuities are given to three persons of 10*l.* each. Of the value of those annuities there is no distinct *constat* before the Court, but it appears, from the evidence, that Cross, the housekeeper, came into the deceased's service shortly after his wife's death ; though her age does not appear, she cannot be less than forty ; she may be sixty. Another of the annuitants, Mrs. Petworth, the widow of the deceased's brother, appears to have been about sixty-eight ; and Jupp, the brother of the deceased's wife, is described as old and

infirm, and past work, and, therefore, not junior in age than Mrs. Petworth, probably much older. Neither of the annuities, I conceive, can be taken at more than seven years' purchase; but supposing they were worth ten years' purchase, it would take 300*l.* to purchase these three annuities, which would leave more than 1500*l.*; and assuming that the debts and expenses of proving the will would amount to 500*l.*, there would then remain 1000*l.* to be divided between the two executors; and even if it were only half the property, 900*l.*, or 450*l.* each, I should say that this is a large proportion of the property to be given to two persons who are entire strangers in blood to the deceased, and to the prejudice of his blood relatives; one of these two persons being a friend of the deceased, and the other a solicitor, whose father had been employed by the deceased in acts of business. Here, then, is one of those circumstances of suspicion to which I have referred, that is, when the drawer of the will takes a considerable proportion of the property which is the subject of the disposition, and it is a circumstance to arouse the vigilance and jealousy of the Court, to weigh the evidence, and see that there is proof that the deceased executed the will with a knowledge of its contents, either by instructions from the deceased, or by the will having been read over to him, or by any other mode by which his intentions can be collected.

There is another circumstance which should excite a degree of vigilance in the mind of the Court, namely, the capacity of the alleged testator. Where a person is in the full possession of his intellects the mere act of execution would lead to the

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inference that he knew the contents of the instrument he signed ; where the person is of a lower grade of capacity, owing to age or intemperance, a very different degree of proof is required to satisfy the Court that the instrument contained the real intentions of the deceased.

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The testator appears to have been a person of coarse and low conversation, from the expressions he made use of, and of vulgar manners, though he possessed a kind heart, as is exemplified by his supporting his wife's relation after he became incapable of work. He possessed also a considerable degree of shrewdness ; but in the latter years of his life he became addicted to excessive drinking, beginning at ten o'clock in the morning, and continuing during the whole day, drinking one glass of brandy and water after another, till he became " just like a madman." One of the witnesses says, " he was always at it, and when tipsy he was mad." When he was not drunk he says, " he was of sound mind,—perfectly so, and at the time the will was executed he was in bed." When he was confined to his bed the use of spirits had been prohibited by his medical attendant, Mr. Johnson, who says that, although he did not altogether abstain from spirits, he never saw him afterwards under the influence of liquor ; on the contrary, whenever he saw him, he was rational and sensible. So that, when he was in the habit of indulging in liquor, he was in a state of utter incapacity ; but when sober he was rational and sensible. But though these habits of intemperance, in conjunction with age, may not have produced imbecility, yet it is impossible not to see that these two causes must necessarily have

impaired very considerably his mental faculties, and, according to the evidence of the witnesses, his memory was most particularly affected; he would forget a thing he had just done, or that was to be done; he would forget that bills had been paid to him, and would demand repayment of them.

Mr. Johnson is one of the witnesses produced in support of the will; and the result of his evidence is, that he was rational and sensible when not under the influence of liquor, but that his memory was extremely bad, and that between age and the use of spirituous liquors his mental faculties had become weak and impaired; and this is the evidence of almost all the other witnesses. Almost all the witnesses examined in opposition to the will state that, for the last twelvemonth of his life, his memory was so impaired and confused, that he was continually making mistakes in giving change; that he forgot orders that had been given, and payments that had been made, and that persons would not pay money to him, but paid it to Cross the housekeeper. But although his memory and mental faculties were, to a certain extent, impaired, he could sufficiently understand matters of business when properly submitted and explained to him, and was capable of making perfectly sensible answers. The Court, therefore, takes it upon this evidence that the deceased was capable of conversing rationally and sensibly to a certain extent, and if it should appear by evidence free from all doubt and ambiguity, that the deceased, either in instructions given by him, or at the time of execution, or by a subsequent confirmation of the will, knew the contents of it, the Court would be bound to pro-

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nounce for the validity of the will. But it will not do this without reference to the evidence on the other side, given by persons equally respectable with those produced by the parties propounding the will; and although it is said that they are disappointed persons, I cannot say that they have deposed under any bias; and I cannot help thinking that those persons, described as disappointed witnesses, because they expected some advantage from the deceased, have not been very fairly dealt with. Why should it be supposed that these persons have deposed contrary to the truth, because they are disappointed? Why are they to be estimated as nothing in the scale, and almost disqualified, because they are disappointed, in comparison with Mr. Durling and Mr. Parker, who are to put 500*l.* a-piece in their pockets? I think I am bound to rely upon the testimony of those persons, who are of a respectable class in life, and who give it with sincerity.

The witness Dunn describes the deceased as labouring under loss of memory, as incapable of managing his affairs, or of making a will, and, latterly, quite a childish person. Willis represents him in the same calamity, and as incapable during the last twelvemonths of his life. Other witnesses speak of his silly and childish conduct in coming out of church; of his faculties having failed some time before his death; of his inability to settle an account, because he could not understand it. Charlton, who accompanied the deceased to the Bank, to receive his dividends, in October 1837, though he does not prove utter incapacity, states enough to show that the deceased was not in the

same condition as when he went alone to receive his dividends before that time. He says that his faculties had been going for the last twelvemonth. Fox, who had known the deceased for six years, saw him on the day the will was executed, and speaks doubtfully as to whether he was conscious of what he was doing, though it certainly appears, from the evidence of this witness, that the deceased on that day showed a degree of capacity and understanding sufficient to have enabled him to make a will if proper care and caution had been used. Godson saw the deceased on the 3d of March, on which day he received some money from him, and he deposes that the deceased talked about settling his affairs; that "he was rational and sensible if ever man was;" that he (the witness) asked him if he had made his will, and he said he had, and that it was in the hands of Mr. Parker, of Lewisham, and that "he had taken care of his sister, and of old John," and had made the same provision for them that he had been in the habit of doing; it appears that he had been in the habit of making his sister-in-law a present of 10*l.* not a regular allowance; but with respect to Jupp there is no evidence of his having allowed him 10*l.* a-year. The witness then mentioned Cross; the deceased said he had taken, or would take, care of her, but intimated that his property should not be squandered away by "tobacco-chums." Now what is the meaning of this conversation,—that he had a will in the hands of Mr. Parker? It is so difficult to reconcile this declaration with the facts, that Counsel have been obliged to conjecture that there must be a mistake of the day; but it so happens

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that Womes confirms the evidence of Godson; he heard the deceased say that he had made his will, and settled his affairs; that "uncle Parker" had done it for him. This was before the will in question was executed, and no such will is forthcoming from the office of Messrs. Parker. If the deceased, on the 3d of March, had a will, which was in the hands of Mr. Parker, of Lewisham, he could have had no intention of making a new disposition of his property. I cannot reconcile his declaration that he had a will, and that it was in the hands of Mr. Parker, of Lewisham, with a belief that the deceased was in the perfect possession of his mental faculties. The Court, therefore, must look a little farther than a bare execution of the paper, for proof of knowledge of contents, where the deceased was in this state of at least doubtful capacity, and so far unable to protect himself against the designs of the persons about him.

Now, who were the relations of the deceased, and what were their claims upon him? Mrs. Loveland, the niece and next of kin, has a large family, not in good circumstances. It is true that the intercourse between the deceased and his family was slight, and there was no great degree of intimacy between them; but it is not the degree of intimacy between such parties which the Court has to consider, but what were the feelings of the deceased towards his relations. He had not a large income (about forty pounds a-year), and his inn did not support itself, so that he had been obliged to sell out part of his stock, he had, therefore, no great command of money to administer to the wants of his relations; but there is abundant evidence to show that, as far

as expressions of regard went, he did intend to benefit his relations, and that he frequently declared that his relations should have his property; that he should be a rogue and a fool if he left it from them. The evidence of Mr. Johnson, in particular, is important, to show that the deceased's relatives were uppermost in his mind; and that if he made a disposition of his property, they would probably be the objects of it, and that it is not probable that he would have excluded them in favour of persons who were strangers in blood.

Who is Mr. Durling? a publican at Bexley, and a friend of the deceased, who came, during his illness, to manage his business, though there is no evidence to show that the deceased sent for him, though he knew he was there; there is some reason to suppose that the sending for him was the act of Cross. What was the deceased's connexion with Mr. Parker? He is a partner in a house of business at Lewisham, which the deceased had employed, though whether Mr. J. F. Parker was the person who attended the deceased, does not appear. One thing is clear, that from June 1836 to June 1837, Mr. Petworth could have had no intercourse with Mr. J. F. Parker, because he was, during that period, out of the country, on an occasion to which it is not necessary for the Court to advert; and it is equally clear, that when he spoke in terms of respect of Mr. Parker, it was with reference to his father, and not to Mr. J. F. Parker; and it appears, further, that the deceased wished to appoint the elder Mr. Parker his executor, but Mr. J. F. Parker represented that his father was too old. With respect, therefore, to Mr. Durling and Mr. Parker,

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there is no ground for supposing that the deceased's regard and friendship for them were of such a nature as to supersede his affection for his relations; nor is there any foundation for the disposition by which so large a proportion of the property is given to them. On the morning of the 7th of March, Calcott, a person who lived in the parish of Chiselhurst, came to the deceased's house, as he says, to inquire whether he had made up his mind to quit the inn; and he had a conversation with him previous to the execution of the will. He describes him as lying in bed, a skeleton of a man compared with what he was; his mind was wandering, and his memory gone: he inquired after a person who had been dead four years. The witness said, "I hope you have settled your affairs?" The deceased answered "yes," and pointed to an old cabinet, as the place where his will was deposited; though, in the former conversation, he had said it was with Mr. Parker. Whilst the witness was down stairs, Mr. Parker came; and when the witness heard it was to make his will, he mentioned the deceased's declaration shortly before, that he had a will. In a quarter of an hour, the witness was sent for, and went up again to the bed-room, where Parker and Durling were alone with the deceased; Parker was standing by the bed, with the will in his hand, and said, "This is Mr. Petworth's will; he has appointed us executors; he wished to appoint my father, but I told him he was too old." This is the first time any intimation was given of an intention of making Mr Parker senior, executor. Nothing, however, was said about the residuary clause, or a bequest of the residue, to any of the witnesses.

Parker then gave the deceased a pen and ink, and he signed it; Parker repeated the words of publication, the deceased put his finger on the seal, and the witnesses signed their names to it. Mr. Calcott says he then went round to the side of the bed, and said to the deceased, "How could you say you had made a will?" The deceased replied, "So I have, and Parker has got it: they have got all my money, and that's all they care for." The witness says, he repeated these words to Mr. Parker, who said, "Ah, he's just as jocular as ever: but I have searched in our office, and cannot find it." During all this time, the only observation of the deceased, with respect to his will, is, that Mr. Parker had the paper, adding, with an oath, "They have got all my money, and that's all they care for;" which is supposed to be a recognition of the contents of the paper. This witness says that the will was not read over by, or to, the deceased, in his presence; and goes on to state, with reference to the capacity of the deceased, "I never can think that the deceased could have known what the will contained; and, if I had known it, I would not have put my name to it." It has been said that, as this witness attested the execution of the will, he is deposing against his own act: but this is not a true description; the witness says he does not think the deceased knew the contents of the paper, as he believes it was his intention that his property should go to his relations; and Womes says he would not have signed his name, if he had known the contents of the will. They do not say that the deceased was incompetent to make a will; they act on the supposition that it was the intention of the

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deceased that his property should go to his own relations. This is not like witnesses coming to depose against their own act; they relate what did actually take place at the time.

Womes, the other attesting witness, is the school-master and parish-clerk; and he says he was sent for, and when called up-stairs, he found the deceased in bed, Parker standing by the side of the bed, and Durling being also in the room: so that the will was made in the presence of the two executors and residuary legatees. The witness says that Parker held the paper in his hand, and gave it to the deceased, who signed his name, Parker saying something about a will: the witness and Calcott then signed it. He says he heard the deceased speaking to Calcott, but could not distinguish the words. This witness also says that the will was not read over in his presence, nor was anything said about what it contained. His belief, that the deceased was ignorant of the contents of the will, is founded on the frequent declarations of the deceased that he would make a will in favour of his poor relations: and he says, he would not have attested the will if he had been aware of its contents. He says that the deceased's memory was completely lost, and that the most he could say of him is, that he was rational.

It is said the executors labour under this disadvantage, that they cannot prove the instructions; whose fault is that? Was any secrecy necessary to be observed? Not the least. There is, therefore, nothing to lay a probable foundation for this disposition; either a dispute with the deceased's relations, or a motive to leave these two persons any part of

the property ; and Womes expressly states that the deceased told him that he had made a will, and provided for his poor relations. Is it possible, then, to hold that the principles of the law are complied with in this case, where there is no probable foundation for the disposition ; nothing whatever but a bare execution ? There is no conversation in which it was shown that the deceased knew what the disposition was, or any reference to the manner in which the residue was disposed of, except the loose declaration, " They have got all my money, and that's all they care for."

If, under these circumstances, the Court could not pronounce in favour of a will of this description, supposing the case had rested here, are there any circumstances calculated to detract from the weight of suspicion ? There is no other circumstance which should render it likely that the deceased would exclude his own relations, than that he should have considered 1000*l.* not too large a reward to these two persons for carrying into execution his testamentary intentions.

But the case does not rest here ; for it is said, here is a direct recognition of the will by the deceased, to two persons, clerks in the Bank, who were in the habit of frequenting the deceased's house ; and were there on one occasion after the will was executed. One of these persons states that the deceased was asked by some one whether he had made his will, and he replied, (as far as the witness could collect) he had, and had left Cross 10*l.* a-year, and old John 10*l.* a-year ; precisely the same declaration which he had made on the 3d of March to Godson. What is there to show that it was of this

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will he was speaking? The other witness says, he "understood" from the deceased that he had left the rest of his property after his death to Parker and Durling; but did he understand, or did the deceased know what was the amount of the benefit he was giving away from his own relations to these two persons? On the contrary, he expressly says he understood the deceased to say that 30%. a-year was as much as he had to leave; so that he supposed what he had left to his executors was a mere trifle. I do not consider that the evidence of these two witnesses (and it is admitted that their object was to obtain a recognition) proves anything more than that they "understood" that what was left, after the three annuities were provided for, should go to the executors, but that the deceased believed this to be of small amount. This is the evidence which is to supply the deficiency of the execution of the will and to show a knowledge of its contents; but I do not think there is evidence of more than a bare execution, which is not sufficient where the testator is in a state of weak and impaired capacity, to put it no higher than that.

I am of opinion, on the whole, that the evidence is not sufficient to sustain the act, and I pronounce against the validity of the will, which is not proved to be the will of a testator, who knew and understood the contents, or to contain the real wishes and intentions of the deceased. And as the paper has been brought forward on the behalf of persons for their own benefit, I am of opinion that I must go further, and condemn those parties in the costs of the proceedings.

ASPINWALL *against* THE QUEEN'S PROCTOR.

On Petition.

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JOHN HAMMOND, late of Providence, in Rhode Island, and a citizen of the United States of America, died at or near Weedon Beck, in the county of Northampton, on the 7th of May, 1838, in consequence of a fall from a coach (which overturned) while travelling to Liverpool, in order to embark for the United States.

Administration of the effects of a citizen of the United States of America, dying intestate in this country, *in itinere*, limited for the purpose of paying his debts, &c. and transmitting the balance to the Treasury of the United States, refused to the American Consul, upon the non-appearance of any next of kin of the deceased, the Crown opposing the grant.

The deceased left property in this country to the amount of about 1000*l*. Colonel Aspinwall, the American Consul-general, took possession of some of the effects, but Messrs. Baring and Co. declined to pay 627*l*. due to the estate of the deceased, till an administration was obtained; accordingly, upon an affidavit by the Consul, "That by an act of Congress of the United States of America, passed on the 14th of April, 1792, concerning the duty of Consuls and Vice-Consuls resident abroad, and which by the instructions they are enjoined to act upon and follow, it is by the second section thereof, amongst other things, recited, 'That it shall be their duty, where the laws of the country permit, to take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any ship or vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed

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to take care of his effects; they shall inventory the same, with the assistance of two merchants of the United States, or for want of them of any others, at their choice; shall collect the debts due to the deceased in the country where he died, and pay the debts due from his estate, which he shall have there contracted; shall sell at auction, after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts; and at the expiration of one year from his decease, the residue and the balance of the estate they shall transmit to the Treasury of the United States, to be holden in trust for the legal claimants. But if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings.' A decree issued, citing the next of kin of the deceased, if any, in special, and all others in general, having, or pretending to have, any right, title, or interest in the estate and effects of the deceased, to accept or refuse letters of administration, or to shew good and sufficient cause, if they have or know any, why letters of administration should not be granted to him (the Consul) limited for the purpose only of taking possession of the personal estate of the deceased within the consulate, and collecting the debts due and owing to him in this country, and of paying the debts due from his estate, and at the expiration of one year from his decease of transmitting the residue and balance to the Treasury of the United States of America, there to be holden in trust for the legal claimants, pro-

vided no personal representative of the deceased shall be appointed, with an intimation that in default of appearance the judge would proceed to decree letters of administration, limited as prayed." To this decree an appearance was given by the Queen's Proctor, and the question as to the grant of administration came on by petition, the Court having declined to enter into it upon motion.

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Phillimore and *Addams*, in support of the grant. In the first place the Queen's Proctor has no *persona standi*; but assuming that he has a *persona standi*, we are entitled to the administration by the general law, and by the particular law of the United States.

The deceased was a foreigner, and he had no relations in this country entitled to take administration, and by the general law the property of a foreigner dying intestate here belongs to his country (*a*). The particular law of the United States requires the American Consuls in foreign countries to take possession of citizens' effects, which the law of this country permits; for it is the practice of the British Consuls, and those of all maritime countries, to take possession of the effects of their own countrymen dying abroad intestate. In the case of *Sidy Hamet Benamor Beggia* (*b*), a native of Fez, who died at Gibraltar; leaving effects there and in this country, a similar grant to that now prayed was made by this Court.

There is no principle in the Law of Nations

(*a*) Vattel, B. 2, c. viii., sec. 109, 110.

(*b*) 1 Add. 340.

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which gives a right to the Crown of this country to interfere where there is no question as to domicile, the party, as in this case, dying *in itinere*, on his way to his own country.

The *Queen's Advocate* and *Haggard* contra.

The law of the American Congress authorises their consuls to take possession of the property of citizens dying abroad intestate, only where the law of the country permits it. There is no case in which such a grant has been made by this Court. In the case referred to, the Emperor of Morocco was entitled to the property, and the administration was granted to his agent.

There is no satisfactory proof of the American law, and if there had been, we are not bound by it: and it may be a grave question whether we should adopt the principle of reciprocity upon this point. The rule of distribution is according to the *lex domicilii*, but the mode of administration, by whom and by what Court, is governed by the *lex loci rei sitæ*. The Queen's Proctor appears on the ordinary ground, that where there is no person entitled to an intestate's effects the Crown takes them in trust.

JUDGMENT.

SIR HERBERT JENNER.

The question arises with respect to the right of the American Consul in this country to take administration of the goods of an American subject, clearly domiciled in America, who died *in itinere*, leaving personal property here, and money in the hands of a merchant in this town.

It appears, that on the death of Mr. Hammond,

Colonel Aspinwall, the American Consul in this country, took possession of the property about him, paid his funeral and other necessary expenses, but upon application to Messrs. Baring and Co. they declined to pay over the money in their hands until letters of administration were taken out, and they could obtain a valid discharge. An application was accordingly made to the Court to grant administration to Colonel Aspinwall, founded on an act of Congress, authorising American Consuls to take possession of the effects of citizens of the United States dying in foreign countries; but the Court was of opinion that it could not grant such an application on an *ex parte* motion, and some discussion took place as to the form of the decree which should go out. Eventually, a decree went out against all persons, and an intimation was given, that if no person appeared to shew cause against it, the Court would grant administration to Colonel Aspinwall. The decree was served in the usual manner, and an appearance was given on behalf of the Crown, praying that the Court would reject the claim of Colonel Aspinwall. It is said that the Crown has no *persona standi*, for that the deceased, being a domiciled foreign subject, dying *in itinere*, the right to his property, locally situated in this country, is governed by the law of the country to which he belonged. It is true, that by the law and practice of this Court, the distribution in such cases is to be according to the law of the country in which the party was domiciled at his death; but the property being in this country the Court will grant administration to some person who is entitled to the custody of the property, and has au-

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thority to pay the debts due from the deceased ; and the Court, in deciding the question, whether Colonel Aspinwall is or is not entitled to the administration, must be guided by the law and practice of this Court. Now I cannot say that the Crown has no right to interfere with property belonging to foreigners, in order to protect that property ; that in all cases where foreigners die intestate in this country, the Crown has no right to appear and shew cause why a person claiming the administration ought not to have it. The Crown has a right to the custody of the property till a superior title to it can be shewn. This law is not peculiar to our country ; it is the general law, and it cannot be the general law of the United States that British Consuls are entitled to administer the estates of British subjects dying in the United States, or why was the special law of New York passed, which is mentioned in the affidavit ? What is the law upon which Colonel Aspinwall rests his claim ? An act of Congress passed in 1792, for the guidance of Consuls in foreign countries, giving them certain powers and authorities so far as is consistent with the law of the country to which they are accredited ; that is, the power of the Consuls is to be governed by the law of the country to which they are accredited, and not by the law of the country from which they are sent. There may be grave reasons why the law of the United States should be different from the law of this country, but if there is a difference, then no authority at all is given to the Consuls. The question, therefore, is, not whether the law of America authorises the Consul to take possession of the property of its sub-

jects dying in this country, but whether the law of this country permits it, and it is upon the ground that it does so, that Colonel Aspinwall applies for letters of administration.

I am not aware of any case in which it has been held that, by the law of this country, it is competent to a foreign Consul to take possession of the property of a foreigner dying here, *in itinere*, domiciled in his own country. In the case of Sidy Hamet, the Emperor of Morocco claimed not the custody of the property but the interest itself; the *jus in re* was in him, and if it could be shewn that the property in this case has devolved to the American Government, the Court would be inclined to grant letters of administration to the Consul. But it is only to hold it in trust, and if no claim is made to the property, then the Treasury of the United States would be entitled to take it, and it is not shewn that Mr. Hammond died without relations.

Is it, then, the law and practice of this Court, that such an administration should be granted? I apprehend not, and that the Crown is the party to see that the property of any person dying in its dominions gets into proper hands.

It has been said, that by the law of the United States, British Consuls may take possession of the property of British subjects in similar circumstances. But this is not by the Law of Nations, but by custom or express enactment, and it is not a law which this country is bound to follow: this country has not adopted the principle of reciprocity in this respect.

I am of opinion that there is not sufficient evidence to shew that the administration ought to be

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granted, as prayed, to Colonel Aspinwall, and I reject his petition. No claim is made by the Crown.

RAYNER *against* GREEN.

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On Petition.

An executor intermeddling with the effects of a testator to such an extent as would constitute a person executor *de son tort*, may be compelled to take probate; the executor in this case having satisfactorily explained his conduct, the Court refused to compel him to take probate.

Mr. James Smith, of Chippen Wickham, died 4th of November, 1823, leaving a will, whereby he bequeathed two cottages, an orchard, and a garden to his wife, her heirs, administrators, and assigns, appointing her, John Pounceford, his son-in-law, and John Green, a publican and small farmer in the neighbourhood, executors. Probate of the will was taken by Pounceford alone, in February, 1824, power being reserved to Green. The widow died in July, 1824. Pounceford intermeddled with the effects, and continued to administer them till February, 1826, when he died, leaving part unadministered. Green, the surviving executor, had never taken probate of the will, but it was alleged that he had intermeddled, by taking upon himself the management and control of the cottages, orchard and garden; receiving the rents, making agreements for letting them, giving notice to the tenant to quit, and doing acts proper to an executor, and holding himself out to the world as such; and the object of the present proceeding was to compel him to take probate of the will, in order to get a representation to carry on proceedings

in Chancery. On the part of Green it was alleged, and supported by his affidavit, that he had never acted or intended to act as executor; that he had never received his legacy of 10*l.*, as executor under the will, and never intended to claim it; that all he had done was as the agent and friend of Pounceford, the other executor, who resided in London, and that he had never acted in any way with reference to the estate, after the death of Pounceford, in 1826. It appeared that the cottages and appurtenances were at first supposed, from the manner in which they were devised, to be freehold, and the widow was considered by Green as the devisee of the property, which turned out to be leasehold and chattel property.

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Nicholl, in support of the petition, *Haggard*,
contra.

JUDGMENT.

SIR HERBERT JENNER.

As the testator died in 1823, the transaction is of an antiquated date; but I do not know that this will have any effect upon the decision of the Court, if the facts shew that there has been such an intermeddling as to render Green executor *de son tort*, and compellable to prove the will. The acts alleged to have been done by Green are such as, without explanation, to shew in what character they were done, will render him liable to be called upon to prove the will, and he cannot escape from the burthen. But it is alleged on his part, that he did not intermeddle as executor; that he had carefully abstained from acting as executor, and that

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all he did was as the agent of Pounceford ; that the cottages were believed to be, and were dealt with and treated as, freehold, and that he acted as agent of the widow, believing her to be the devisee of the property ; and when the widow died, he continued to act under the authority of Pounceford, the son-in-law of the testator, who had acted as sole executor, though he found Green, who resided in the neighbourhood, a convenient person to manage the property. I cannot think that what has been done by Green is of such a nature as to justify the Court in holding that he has taken upon himself the character of an executor. He expressly swears that he did not intend to act ; that he has not claimed his legacy, and does not intend to claim it ; that all he did was as the agent, and under the authority of Pounceford, and this is borne out, as far as they go, by his letters. And the Court is the more inclined to pay attention to what Mr. Green has sworn, as he is corroborated by the affidavit of a clerk to a solicitor, who states that he advised him not to act as executor. After the death of the widow, he continued to act as the agent of Pounceford, whom he had reason to believe to be the party in possession of the property under the will of Mrs. Smith, till the death of Pounceford, and no longer. I am, therefore, of opinion to reject this petition.

The Court made no order as to costs.

CONSISTORY COURT OF LONDON.

LLOYD *against* PETITJEAN, falsely calling herself
LLOYD.

1839.

EASTER TERM.
May 30th.

This was a question as to the admissibility of a libel in a suit of nullity of marriage, promoted by George Lloyd, a natural son of Sir Wm. Lloyd, against Athalie Pulcherie Clotilde Petitjean, a native of France, in which country the marriage took place.

The libel pleaded,

First, That according to the laws and customs concerning marriages, which were in force in the kingdom of France, in the month of October, 1837, before the celebration of a marriage, the officer of the civil state shall make two publications, with an interval of eight days, one day being Sunday, before the door of the Town Hall; these publications, and the act which should be drawn up on the occasion, shall enumerate the first names, the surnames, the professions, and the residences of the persons about to be married, their quality of majors or minors, and the first names, surnames, professions, and domiciles of their fathers and mothers (a).

(a) Code, Art. 63.

A marriage between an Englishman and a domiciled French lady, at the house of the British ambassador at Paris, by the chaplain to the embassy, is a valid marriage, under the statute 4 Geo. 4, c. 91.

By the law of France, the marriage of a son under the age of twenty-five years, being null and void without consent.

Query, whether an Englishman above the age of twenty-one years, but under the age of twenty-five years, contracting a marriage in France according to French forms with a French lady of full age can, in the Courts of this country, proceed for the purpose of annulling the marriage by reason of such minority and want of consent.

ceed for the purpose of annulling the marriage by reason of such minority and want of consent.

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That there is no marriage where there is no consent (a).

That a son who has not attained the age of twenty-five years completed, and a daughter who has not attained the age of twenty-one years completed, cannot contract marriage without the consent of their respective fathers and mothers, and in case of disagreement, the consent of their respective fathers (b).

That the children of a family having attained the said respective ages, are bound, before contracting marriage, to demand, by a respectful and formal act, the advice of their father and of their mother, or that of their grandfathers and grandmothers, when their father and mother are dead or unable to signify their consent (c).

That after the aforesaid ages, up to the age of thirty years complete for a son, and up to the age of twenty-five years complete for a daughter, the aforesaid respectful act, and upon which there shall not have been any consent to the marriage, shall be renewed two other times from month to month, and one month after the third act, the parties may proceed to the celebration of the marriage (d).

That the aforesaid requirements relative to the respectful acts which ought to be made to the father and mother, are applicable to natural children legally acknowledged (e).

The libel went on to plead, that at the time of the marriage, (which took place, in the first instance, by civil contract, before the mayor of the

(a) Art. 146.

(b) Art. 148.

(c) Art. 151.

(d) Art. 152.

(e) Art. 153.

second arrondissement of Paris, on the 26th October, 1837, and on the same day, at the hotel of the British ambassador, at Paris, by the chaplain of the British embassy). Mr. Lloyd, who was born on the 17th October, 1815, was twenty-two years and nine days old; that the consent of the father of Mr. Lloyd was not given to the marriage, for although a certain act of declaration signed by Sir Wm. Lloyd, specifying the age of Mr. Lloyd, and containing an acknowledgement of him as his son, was produced to and accepted by the French authorities, as his father's consent to the marriage, such declaration was not intended to convey a consent to the marriage, of which Sir William was not cognizant, but as an evidence of birth for another purpose; that the first marriage, therefore, was null and void for want of consent on the part of the father of Mr. Lloyd, he being a minor.

With regard to the second marriage, it was pleaded, that neither of the parties was a member of the household or in the retinue of the ambassador, by reason whereof, a marriage between such parties (one of them being a domiciled subject of France) was null and void to all intents and purposes.

Before the argument commenced, a preliminary question arose, whether counsel could be heard on the part of the wife, she having been pronounced in contempt; but the objection was waived on the other side with consent of the Court.

Haggard and Nicholl against the admission of the libel—

The first question is, how far the restrictions on marriage, imposed by the law of a foreign country,

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for the protection of the rights of third parties, can be imported into our law, and employed by a British subject competent to contract marriage in this country, to annul by a sentence of this Court a marriage contracted in France? The incapacity of the husband under the French law, is on the ground of the invasion of the father's rights. The remedy is sought by the husband, not in the French Courts, but here, where he is under no such disability, and where the father is not entitled to such rights; besides, it is not sufficiently pleaded that those rights attach to a natural father. There is no case precisely in point; but the observations of Lord *Stowell*, in *Ruding v. Smith* (a), are not inapplicable to the circumstances of the present case. He says, "It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere; but they have not, *é converso*, established that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in England." Again, he says, "The husband was a person entitled by the laws of his own country to marry without consent of parents or guardians, being of the age of twenty-one; but by the Dutch law, he could not marry without such consent till thirty. Now, I do not mean to say that *Huber* (b) is correct in laying down as universally true 'that *personales qualitates, alicui in certo loco jure impressas, ubique circumferri et personam*

(a) 2 Cons. Rep. 371.

(b) De Conf. Leg. l. 1, t. 3, a. 12.

comitari ;' that being of age in his own country, a man is of age in every other country, be their law of majority what it may ; yet it is not to be laid out of the case, that the Dutch law would impose, in this respect, a very unfavourable disability upon the British subject." Whether *Huber's* doctrine is correct, has been a subject of much discussion by jurists. But supposing there to be a personal disability, it is submitted that the husband has no right to avail himself of a temporary disqualification to invalidate in this country, in which he was under no such disqualification, a marriage with a person under no disability, either by the law of her own country or of his.

This marriage, however, does not rest entirely upon the civil contract before the French authorities, for the parties were re-married according to the rites of the Church of England, in the chapel of the British embassy. If the *lex loci contractus* is to govern this point, the question is, what is that law ? It must be the general marriage law of England before the Marriage Act, (26 Geo. 2, c. 33) which extends to England only. The parties are married at the British ambassador's house, which, it is submitted, is for this purpose, by law, part of the British dominions. Lord *Stowell*, in *Ruding v. Smith* (a), says, that in the English factories abroad, marriages are regulated by the law of the original country to which they are still considered to belong. There is no case precisely like the present. In *Pertreis v. Tondear* (b), in 1790, Lord *Stowell* says, " Taking the privilege to

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(a) 2 Cons. Rep. p. 385.

(b) 1 Cons. Rep. 136.

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exist in ambassador's chapels, (which perhaps has not been formally decided,) I may still deem it a fit subject of consideration, whether such a privilege can protect a marriage where *neither* party is of the country of the ambassador." He doubted, therefore, whether, even in such a case, the marriage was not good. In *Rex v. Brampton* (a), Lord *Ellenborough* said, "that marriages in ambassador's chapels, if made by the allowance of the foreign state, would be good marriages in those countries; but that if not a good marriage in the place where it was celebrated, it would not be a good marriage any where." Mr. *Jacob* (b), observes upon this dictum, "However the Lord Chancellor is reported to have given his opinion in the House of Lords (c), that there was no doubt about the validity of such marriages." Supposing, however, such doubt to have existed, it has been completely removed by the statute passed in 1823, (4 Geo. 4, c. 91). The object of that statute was, as is stated in the preamble, "to relieve the minds of *all* His Majesty's subjects from any doubt concerning the validity of marriages solemnized by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within

(a) 10 East. 282.

(b) Addenda to Roper's Law of Husband and Wife, vol. 2, 497.

(c) Hansard's Parl. Deb., vol. 9, N. S., col. 1319, in the debate on the stat. 4 Geo. 4, c. 67; with regard to marriages at St. Petersburg, Lord *Eldon* said, "that during the fifty years he had been in the profession, he never heard of any doubts, till the late bills were brought in, whether marriages performed in the chapels of our ambassadors were valid. There was no doubt that they were good marriages, and he was persuaded that no contrary opinion would ever be sanctioned by judicial authority."

the country to the Court of which he is accredited ;” and it enacts, “ that all such marriages shall be deemed and held to be as valid in law as if the same had been solemnized within His Majesty’s dominions.” If the ambassabor’s house be, for this purpose, part of the British dominions, it can make no difference whether both or one only of the parties have a British domicil. The act of Parliament was passed for the purpose of relieving the doubts of *all* Her Majesty’s subjects, which it would not do if it do not apply to marriages between British subjects and foreigners.

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The *Queen’s Advocate* and *Addams*, in support of the libel. The validity of the first marriage must depend upon the law of France, the law of England adopting the *lex loci contractus*, with certain exceptions, as where there is an essential difference of religion, or where the law of the country cannot be resorted to, as mentioned by Lord *Stowell*, in *Ruding v. Smith*. We have pleaded that this marriage is invalid by the law of France, which makes no distinction between natural and legitimate children ; we have sufficiently pleaded the law, which will be proved in the usual manner. It is said that the minority of Mr. Lloyd under the French law cannot apply in this case, as the foreign law did not apply in *Ruding v. Smith* ; but the circumstances of that case were not like the present ; here, the question is as to the validity of a marriage in the civil form, between a British subject and a French subject in the territory of France. The civil contract must be according to the general law of the land, which

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is applicable to all contracts, whether the parties be subjects of that kingdom or foreigners. This doctrine has been lately acted upon by Lord C. J. *Tindal* (a), who held, that the holder of a bill of exchange drawn in France, and indorsed there in blank, cannot recover against the acceptor in the Courts of this country, as, by the law of France, an indorsement in blank does not transfer any property in a bill of exchange. The *lex loci contractus* must govern as to all civil contracts.

With respect to the marriage in the British ambassador's chapel, it is said that such marriage is valid under the stat. 4 Geo. 4, c. 91. There has been no decision as to the construction of that act. Before the passing of that act, it was necessary that both parties should be of the country of the ambassador; such was the result of the case of *Pertreis v. Tondear*; and it never could have been the intention of the legislature to legalize the marriages of any persons whatever, if celebrated in the ambassador's chapel, contrary to the law of the country where they took place. The act uses the term "subjects" throughout, and it must have been intended to apply only to cases where both parties were of the ambassador's country; had the legislature intended differently, the statute would have been differently worded; for in an act passed in the same session, (4 Geo. 4, c. 67) with regard to marriages at St. Petersburg, the words used are, that such marriages shall be good "whether both or one of the parties be British subjects."

(a) In *Trimbey v. Vignier*, 1 Bing. N. S. 151.

JUDGMENT.

DR. LUSHINGTON,

In considering the admissibility of this libel, I think it most convenient to direct my attention, in the first instance, to the second marriage, pleaded to have taken place in the house of the British Ambassador at Paris.

The validity of this marriage must be supported, either by the law as it existed previous to the act of 1823, or by the law as affected by that statute. With respect to this act, I am not aware that it has received, after discussion and deliberation, any judicial construction. I have taken some pains to ascertain, whether, in any Court, this question has been judicially determined, namely, whether a marriage in the house of a British ambassador, one of the parties so married only being a British subject, is or is not excluded from the operation of the act? All I can find is, that a case (that of *O'Connor v. Ommaney*), occurred in the Court of Chancery in 1837, in which the payment of a sum of money depended upon the validity of a marriage between a British subject and a native of Switzerland, solemnized in the house of the British ambassador at Naples, and the Master reported that a valid marriage had taken place; which report was not objected to, and being confirmed by the Court, a decree passed accordingly. But I do not find that the point of law underwent any discussion or consideration, and I cannot, therefore, regard this case as a ruling decision.

I begin by considering the words of the statute itself, without reference to any other *in pari materia*, and I may first observe, that it is a remedial

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statute, intended for the redress of what, in the judgment of the legislature, was a grievance and hardship, and according to all rules of legal construction, it is to receive such an interpretation as will meet the evil intended to be remedied; such a statute must have an extended, not a restricted construction. It is to relieve the minds of all Her Majesty's subjects from any doubt concerning the validity of these marriages; words which must be construed in an ample, not a confined sense. The statute certainly is not expressed in very satisfactory terms, because, not a word is said as to whether it applies to marriages between British subjects alone or in which one party only is British, or whether it comprehends all marriages solemnized in a British ambassador's chapel. On the other hand, there are no words of exclusion shewing it was the intention of the legislature to confine the act exclusively to British subjects; it declares that all marriages shall be valid, without exception, and I cannot see on what principle I can put a construction upon the act which should exclude a marriage where one of the parties is a British subject, and the other a foreigner. If I were to do so, I should not carry the act into full effect, for I should not relieve the minds of *all* Her Majesty's subjects from doubt. I am, therefore, clearly of opinion, that, provided one of the parties be a British subject, a marriage under the circumstances of the present case, is valid under the act.

This is the conclusion I have formed, from the statute itself; but another statute had been passed *in pari materia* that very year (*a*), to render valid, mar-

(*a*) 4 Geo. 4, c. 67.

riages had at St. Petersburg, in the chapel of the Russia Company, and in private houses, in which it is expressly enacted, that such marriages shall be good, whether both or one of the parties be British subjects; and it has been strongly and fairly contended, that if the Legislature had intended the same thing in the subsequent act, *in pari materia*, it would have used the same terms. But although it be undoubtedly a principle of law, that, in the construction of an Act of Parliament, you are to look at other statutes *in pari materia*, yet it is a dangerous doctrine to push too far, especially on the subject of marriage. I find, for instance, in a statute passed in the late reign (a), “to declare valid, marriages solemnized at Hamburgh, since the abolition of the British factory there;” the same purpose is intended as in the St. Petersburg Act, but the wording is not the same.

I am not unaware of the very great danger that may arise from legalising in England, marriages had in foreign countries; that the consequences may be these,—you may have the *status* of the parties different in different countries; you may have the issue of a marriage legitimate in one country and illegitimate in another, and cohabitation prohibited in one country, and in another allowed. But these are considerations which fall within the province of the legislature, which has thought fit to pass this act, and it is my duty only to administer the law.

I am of opinion, that the validity of this marriage cannot be impeached, and, consequently, that the libel must be rejected. It is unnecessary that I should enter into a consideration of the law of

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(a) 3 & 4 Wm. 4, c. 45.

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France, as pleaded, with reference to the first marriage, being of opinion that the second marriage is legal by virtue of the statute.

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LLOYD *against* LLOYD.MICHAELMAS
TERM.
Dec. 14th.

Communications from a party in a suit to his solicitor with reference to the suit are privileged communications.

A suit was afterwards instituted by the husband for a divorce, by reason of the wife's adultery, and in Michaelmas Term a sentence of separation was pronounced. In the course of the argument, an objection was taken to an answer to an interrogatory addressed to Mr. Lloyd's solicitor, (with the view of eliciting evidence of the husband's adultery), to the following effect: "Has the producent, since his marriage, been attentive and strictly faithful to the ministrant, as you know or believe? Will you swear that you do not believe that the producent, since his marriage, has had connexion with some woman or women other than the ministrant?" In his answer, the solicitor stated that he had no means of forming a knowledge or belief on either point, except from the information of his client, in his communications with him (the witness) as his solicitor, respecting these proceedings, and such communications being privileged, he refused to give any other answer to the question.

On behalf of the wife, it was contended by *Robertson*, that the privilege set up extended only to a professional adviser in the case, and that no other professional advisers were recognized in these Courts

than proctors and counsel. *Wilson v. Rastall* (a), *Cuts v. Pickering* (b), *Vaillant v. Dodemead* (c), *Mynn v. Robinson* (d), *Evans v. Knight* (e). The Court was of opinion, that such a limitation of the privilege would go too far, excluding common law counsel (who are sometimes consulted in proceedings in these Courts), and even the clerks of the proctor and the persons employed by him abroad; that the solicitor was not an "agent," in the sense used by Lord *Hardwicke* in *Vaillant v. Dodemead*; that he stood in the condition of a confidential adviser with reference to the suit, and that, therefore, the communication was privileged, and he was not compelled to divulge it.

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MICHAELMAS
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(a) 4 Durn. & E. 753. (b) 1 Vent. 197.
(c) 2 Atk. 524. (d) 2 Hagg. 195. (e) 3 Phill. 423.

WEGUELIN *against* WEGUELIN.

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EASTER TERM.
May 30th.

This was a cause of divorce for adultery, brought by the husband against the wife. A witness, who was alleged to be in immediate danger of death, had been allowed by the Court (on April 20th) to be examined *de bene esse* before the admission of the libel. When the cause came on for hearing, this day, the witness so examined was still alive, although said to be *in extremis*.

Evidence given by a witness examined *de bene esse*, by reason of ill health, is not admissible, if the witness be at the hearing of the cause capable of being re-examined.

The Court would not allow the evidence to be received, without an affidavit as to the witness's incapacity to be re-examined, stating that the very

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meaning of the phrase *de bene esse* implied that it was conditional, and that the witness must be re-examined, if capable.

On the 8th of June, an affidavit having been produced, stating that the witness was so ill that she could not undergo an examination without danger; the Court admitted the evidence, and pronounced for the divorce.

SMITH *and* WILLIS *against* DIXON.

1839.

TRINITY TERM.
July 5th.

This was a cause of subtraction of church-rate, brought by Smith and Willis, the Churchwardens of Stebbing, in Essex, against Joseph Dixon, a parishioner and inhabitant.

A libel in the usual form had been admitted without opposition. An allegation on the part of Dixon, in answer to the libel, now stood for admission, pleading,

First, That the rate or assessment, pleaded and referred to in the first, second and third Articles of the libel given in and admitted in this cause, &c., was not duly made and assessed according to law. That the said rate was not, as untruly alleged and pleaded, made for and towards the repairs of the church of the parish of Stebbing, in the county of Essex; and for such other purposes as a church-rate was or is by law applicable, for the party proponent doth allege and propound, that on the Churchwardens, parishioners and inhabitants meeting

together in vestry, on the 7th day of February, 1839, for the purpose of making "a rate for the repair of the church of the said parish of Stebbing," an estimate was by the said churchwardens produced and read to the parishioners and inhabitants assembled; that such estimate, which included certain charges for the salaries of the parish clerk and beadle, and for expenses in respect of the church clock, amounted to the sum of ninety-six pounds and no more, &c.

Second, That in pursuance of the said estimate, and in order to obtain sufficient funds for the liquidation thereof, the said Willis proposed that a rate of sixpence in the pound be made, that such proposition was duly seconded, &c.; whereupon, Dixon, one of the parties in this cause, moved as an amendment, "that the consideration of the question be deferred until that day twelvemonth," which was seconded by Wm. Davey, an inhabitant of the said parish; whereupon Wm. Stock, a parishioner, moved, as a further amendment, that a rate of nine-pence in the pound be made, which having been seconded by Robert Monk, a parishioner, the said original proposition, and the said Joseph Dixon's amendment were, upon a show of hands, respectively negatived, and the amendment of the said Wm. Stock carried; whereupon the said Joseph Dixon demanded a poll, which was taken, and upon the close thereof, the amendment of the said Wm. Stock was carried, &c.

Third, That a rate of sixpence in the pound, as proposed by the said Churchwardens, will produce the sum of one hundred pounds and upwards; and that the said amendment, proposing a rate of nine-

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pence in the pound, was made without any fresh statement or estimate, and that such augmented rate was and is excessive and illegal, &c.

Fourth (a), That the said rate or assessment of nine-pence in the pound is not a fair and equal assessment upon all occupiers of lands, tenements, or premises in the said parish, in respect of the lands, tenements, or premises so occupied or held, used or enjoyed by the several rate payers then in the parish; for the party proponent doth allege and propound, that three several messuages and gardens annexed thereto in the said parish are not assessed in the said rate, but the same, and the names of the occupiers thereof, are altogether omitted therein, and that such several messuages and gardens respectively are assessed to the poor rate of the said parish.

That the said rate or assessment is made without a specification of the different tenements, lands and premises in respect of which the occupiers thereof are liable to such rate or assessment, and that (*the rateable value in respect of a church-rate for the said parish is in some instances more and in others less than the proper rateable value*—these words were struck out, agreeably to the directions of the Court, and the following were inserted :) in consequence of such omission or want of specification, the several rate-payers of the said parish are not informed for or in respect of what property they are severally rated at or assessed.

The fifth, in supply of proof, referred to the original rate, and also annexed two exhibits, C

(a) Those words of this article which are in *italics* were rejected by the Court.

and D, and pleaded C to contain the names of the persons and value of the properties held by them in the said parish, and wholly omitted in the said church-rate; and D to be a true copy of several parts of such rate in which the inequalities of assessment appear as pleaded in the fourth Article. These exhibits were as follows (a):

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(C) Names of occupiers and descriptions of property held by them and omitted in church-rate book for church-rate of 7th Feb. 1839, at Stebbing, in Essex.

Occupier.	Description of Property.	Value per annum.		
		£.	s.	d.
Chopping, Sam., Senr.	Cottage and Gardens at Bran End	3	0	0
Chopping, John	Cottage and Garden in Mill Lane	2	12	0
Nicholls, Zachariah	Cottage and Garden in Brain-tree Road	5	4	0

(D) Names of occupiers and descriptions of property held by them and unequally assessed.

Occupier.	Assessment.	Amount of Rate.		
	£. s. d.	£.	s.	d.
Chopping, Samuel	73 15 0	2	15	3½
Dixon, Joseph	152 15 0	5	14	2½
Erith, William	123 0 0	4	12	3
Crow, James	4 15 0	0	3	6½

Addams opposed the allegation. He contended, that in order to invalidate a church-rate, it is not sufficient to shew that it exceeds the estimate of the Churchwardens; and with regard to the omissions, that they were of trifling amount, and would not affect the validity of the rate.

(a) The exhibits C and D were struck out of the allegation as reformed.

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Haggard, in support of the allegation.

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In a suit for subtraction of a church-rate of nine-pence in the pound. An allegation, pleading that the churchwardens having produced an estimate and required a rate of sixpence in the pound, which would have been sufficient to meet all necessary demands, and that the rate of nine-pence in the pound, which without any estimate, was moved as an amendment, and carried, and was excessive,—admitted as being *prima facie* an answer to such suit.

JUDGMENT.

DR. LUSHINGTON.

The foundation of the legality of a church-rate is, that the money is necessary for sustaining the fabric of the church, for repairs, and for such expenses as are indispensable to the decent and proper performance of divine worship; and *prima facie*, the Churchwardens should, in the first instance, produce an estimate of the sum required for these purposes, as they are not to advance the money themselves. I do not mean to lay it down, that if Churchwardens, under peculiar circumstances, propose a rate which is utterly inadequate, the parish is bound by their estimate; but I merely say that, *prima facie*, they ought, in the first instance, to state the amount required. I am confirmed in this opinion by a case in the Court of Queen's Bench, where that Court, being called upon to compel the making of a church-rate, held it to be a sufficient return to the *mandamus*, that the Churchwardens had refused to produce an estimate (a).

The Churchwardens then having produced an estimate, which I consider to have been a correct proceeding, I must presume that they included in the estimate (as it was their duty to do), all the legal demands that would be made upon them, and that there were no other expenses likely to be incurred, for which a rate would be required. Looking to the circumstances stated in the plea, I must believe, till the contrary be shewn, that a rate of sixpence in the pound would have been sufficient for

(a) 10 Ad. & Ell. p. 730.

the expenses included in the estimate, and that a rate of nine-pence is excessive ; and a rate, which is palpably and clearly excessive, is illegal, and cannot be enforced by this Court. The legality of a church-rate depending upon its necessity, for the purposes I have mentioned, if the Court should sanction a rate made, to an indefinite extent, without regard to the estimate produced, it would be accessory to an abuse which formerly crept into parishes, when church-rates were made for covering expenses totally and entirely irrelevant to the proper subjects of church-rate. I consider the objection to the rate, on this ground, admissible.

With respect to the other objection, I think it is an unfortunate circumstance, that, in the present state of the law, the Court is under the necessity of either quashing a church-rate, or of supporting it altogether. I should be exceedingly unwilling to quash a rate, on the ground of an omission so small as this. Upon the present occasion, it is not necessary to consider whether the rate would be vitiated by the omission of the names of persons on account of their poverty ; in strictness, the proper course is to assess all, and afterwards to excuse such as are too poor to pay. If indeed there was a considerable omission, which was intentional, I should be bound to quash the rate ; but it has never been decided that, where, under peculiar circumstances, which may justify it, there has been an omission to rate for very minute sums, such rate is illegal. The Article relating to the omission of these persons I shall, therefore, direct to be struck out.

With regard to the other ground of irregularity, it is not pleaded in a satisfactory form ; it is stated

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An article in an allegation, pleading omissions of a small amount in a church-rate, rejected.

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that some occupiers are rated at more, and others at less than their proper rateable value,—without specifying who is rated beyond, and who below, the proper value. If certain persons are rated below the proper value of the property they occupy, it is an admissible averment; but it must be distinctly stated who are the individuals so under-rated. If, however, the rate is, in other respects, right and proper, it is not a slight disparity between two persons' assessments that would induce me to overturn the rate; but if it be clearly a partial assessment, exposing one set of persons to a burthen beyond what they ought to bear, in respect to their property, I shall be compelled, in justice, to quash the rate.

August 7th.

The admission of an allegation, on the part of the Churchwardens, responsive to the preceding allegation, came on for debate this day. It pleaded, with reference to the increase made in the rate beyond the estimate, that no church-rate had been made in the parish for several years; that the Churchwardens, fearful of exciting the parish, had omitted a sum required for the repair of the church bells (two of which were cracked and useless), and that the produce of a rate of three-pence in the pound had been calculated in the vestry to be the sum requisite for such repair, and that the parish had been assessed for church-rate on the poor-rate assessment.

Haggard, in opposition to the allegation.

Addams, in support of it, was stopped by the Court.

JUDGMENT.

DR. LUSHINGTON.

According to what is pleaded in this allegation, I am clearly of opinion that it is admissible. It states, in answer to the defendant's allegation, that, for several years, whenever a rate has been proposed, it has been rejected, and that, on that account, and to prevent any excitement in the parish, the Churchwardens confined their estimate to the amount indispensably requisite to defray the unavoidable expenses, and that this was the reason why, in their estimate, they did not include the repair of the bells. In the defendant's allegation, no reason is stated, which in any degree accounted for the augmentation of the rate. It is said that there was no estimate of the expense of repairing the bells; but if the rate shall turn out no more than is sufficient, the want of an estimate is not a fatal objection.

As to the repair of bells, it is competent to the vestry, or a majority of the vestry, to vote a rate for that purpose. I apprehend that the Churchwardens alone can apply a rate only to expenses which are necessary for sustaining the structure of the church, and for the decent performance of Divine Service therein; but the majority of the vestry may, if they think fit, authorize a rate for this purpose, and this is a power they have, in this instance, purported to exercise.

The allegation then pleads, with reference to that part of the adverse allegation, which states that parties are unequally assessed, and that there is a want of specification of the property, for which

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An allegation in a suit for subtraction of church-rate, having been admitted, pleading that the rate in question, of nine-pence in the pound, was excessive; an allegation in reply, stating that upon a sixpenny rate being proposed by the churchwardens for absolute necessities, an increased rate of nine-pence in the pound, was moved and carried, for the purpose of repairing the church bells, upon a calculation made at the time,—admitted as a sufficient explanation of such increased rate.

Held that a church-rate made upon the same assessment as the poor-rate, is a valid assessment.

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parties are rated to the church-rate,—that the church-rate is made on the same assessment as the poor-rate, and that the poor-rate books are open to the inspection of the parishioners: so that any person who considers himself to be unequally assessed, may ascertain the fact by inspecting the poor-rate books. As an answer, *in fact*, there can be no doubt that what is here pleaded is an answer; for if any parishioner has an opportunity of referring to the poor-rate books, it cannot be said that he has no means of ascertaining whether he is rightly assessed or not. But a question *of law* arises, whether or not a church-rate made on an assessment for a poor-rate is valid in point of form; whether an assessment must be drawn out for that specific purpose. I have no authority for that proposition. Undoubtedly, where the assessment for a church-rate differs from that for the poor-rate, or where the parties have no opportunity of ascertaining that it is a just and equal rate, that mode would be objectionable; but here these objections do not apply. With one exception, namely, that of tithes, which are assessable to the poor and not to a church-rate, the assessments are the same for both poor-rate and church-rate; and being so, does the law require the parish to be put to the expense of having the whole re-written? I know of no authority in law for this proposition, and I see none in common sense. All that is required is, that every parishioner should have an opportunity of seeing whether the rate be equal or not, and if he has that opportunity, by inspecting the poor-rate books, my opinion is, that the law is satisfied.

I am of opinion that this allegation contains an answer to the allegation on the other side, and I, therefore, admit it.

No further proceedings were had in this case, the defendant consenting to pay the rate and costs.

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PREROGATIVE COURT OF CANTERBURY.

PECHELL v. JENKINSON.

1839

TRINITY TERM.
July 15th.

This was a question as to the validity of a codicil, without date, to a will dated the 5th of June, 1830, the testatrix dying on the 20th of January, 1839; whether or not the codicil was to be considered with reference to the provisions of the stat. 1 Vict. c. 26.

The circumstances are fully stated in the judgment of the Court.

The *Queen's Advocate* and *Phillimore*, in support of the codicil.

Haggard and *Harding*, contra.

JUDGMENT.

SIR HERBERT JENNER.

This is a question as to the validity of a codicil to the will of Mrs. Sarah Pechell, of Berkhamstead, who died in January, in the present year,

An unattested codicil without date, the deceased dying in Jan. 1839, pronounced for, the case being bare of facts, and there being nothing to shew that the codicil was signed after the 1st of Jan. 1838, when the stat. 1 Vict. c. 26 came into operation.

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leaving a will and eleven codicils, including that propounded.

The will bears date 28th June, 1830, it gives the residue of her personal estate and the produce of her real estate to her three sons, Samuel G. Pechell, Augustus Pechell, and the Rev. H. R. Pechell, and appoints them executors.

The codicil in question is without date and unattested; it is in the deceased's own handwriting, and is written on the third side of the sheet which contains the will. It is in these words:—

“In order to prevent any doubts that might arise as to the true intent and meaning of the residuary clause in my will, I declare it to be, and I give and dispose of all monies, stock, and securities for monies, and all property and effects whatsoever possessed by me, or to which I am entitled, and also all monies, stocks, and securities whereof I am entitled to dispose in virtue of any power or discretion under the will of my late dear husband, or any codicil thereto; or under the will of my son, Paul William, and which are not respectively otherwise by me specifically disposed of, to and for the benefit of my three sons in such manner as in the said residuary clause is mentioned.”

“SARAH PECHELL.”

This codicil is opposed by Mrs. Jenkinson, wife of the Bishop of St. Davids, one of the daughters of the deceased, asserting herself to be interested in certain estate and effects over which the deceased had a power of disposal, and that such interest is prejudiced by the said codicil. It has been propounded in an allegation given on behalf of the

executors to which the answers of Mrs. Jenkinson have been taken, and the case now comes before the Court to be heard on those answers only, no witnesses having been examined. The capacity and handwriting of the testatrix have been admitted, and the question is, simply, whether the codicil comes under the operation of the statute 1 Vict. c. 26 or not? It being contended for the executors on the one hand that the presumption is in favour of the codicil being written before the 1st of January, 1838, when that act came into operation, and that it lies on the other side to shew that it was written after that time; while for Mrs. Jenkinson, it is contended, that the burthen of proof lies on the executors, who ought to prove the codicil to have been written before the act came into operation. Looking to the will and codicil, and the admissions of the party as to capacity and handwriting, I cannot doubt the intention of the testatrix that the paper should operate as a codicil. The Court being satisfied of this intention, cannot enter into the consideration urged on behalf of Mrs. Jenkinson, whether the deceased fully knew and understood its legal construction or operation. The only question for the Court to determine, is, whether the paper is entitled to probate as part of the will. Of the several codicils before the Court, three appear to have been executed and attested in the presence of two witnesses, and these three appear to have been codicils to a former will; the latest date appearing on the face of any of the papers is 1837, which appears together with the deceased's signature in the margin of the codicils No. 4, and No. 10, opposite to certain cancellations.

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Under the old law it is admitted the codicil would be good. What then is the legal presumption in this case, throwing out of consideration the allegation and answers, for the answers give no material assistance? The real question is, does the late act of parliament affect the case or not? The will is dated in June, 1830; doubts were entertained when the act first came to be considered, whether alterations made after the 1st of January, 1838, in a will bearing date *prior* to 1838, were not, under the 34th section, exempted from the operation of the act; but the Court was of opinion, after discussion of the point, and seeing what anomalies must arise out of such a construction, that such could not have been the intention of the legislature, and that the object of the 34th section was to protect wills made between the 3rd of July, 1837, the time of passing the act, and the 1st of January, 1838, when it came into operation. Is the Court to hold that, because a paper is without date, it was written after the 1st of January, 1838, and consequently, being unattested, is to fall under the new law? Is not the Court rather to be astute in finding means to carry into effect the intentions of a testator?

I am of opinion that where a case is bare of circumstances like the present, and the deceased was as likely to do what she has done, before as after the 1st of January, 1838, the presumption should rather be that it was done before that time. There is nothing here to lead to a contrary conclusion; every person is presumed to know the law, and where a codicil is written without date, but signed by the deceased, the Court would, in the absence of

circumstances, tending to a contrary conclusion, be bound to presume that it had been executed according to the law as it stood at the time it was written. Its being written on part of the same paper with the will is a strong presumption in its favour. I agree too, in the observation of counsel, that the admission in the answers of the codicil having been transcribed from a draft affords a presumption that the draft was prepared by a professional man, and that it was given to and transcribed by the deceased before the passing of the act, because, if given after the act was passed, the deceased would have been instructed that it was necessary to execute it, and that she would have executed it in the presence of two witnesses.

In this case, I am of opinion that the codicil is entitled to probate.

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VIESCA (by his Attorney) *v.* D'ARAMBURU.

On Petition.

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The deceased, Don Domingo de Aramburu, a Spaniard, died at Cadiz, 3rd September, 1835, leaving considerable property in the hands of his bankers at Paris, and 10,000*l.* in England, in the custody of Mr. Campbell, a merchant in London. On the 13th October, 1835, Don Angel D'Aram-

The deceased, a Spaniard, died domiciled in Spain, leaving 10,000*l.* in this country:

pending a suit in the Court at Cadiz, as to the validity of one of two wills of the deceased, a judicial administrator was appointed, with a power to pay to the heirs of the sister of the deceased a moiety of his property, to which they would be entitled in any event. The Court, carrying out the decree of the Court at Cadiz, granted administration to the attorney of the judicial administrator limited to receiving the 10,000*l.* in this country.

1839. buru, the son of the deceased's brother, set up or
 MICHAELMAS propounded in the Civil Court of First Instance at
 TERM. Cadiz, a will of the deceased, dated 29th December,
 Nov. 16th. 1814, in opposition to another will, dated 12th
 2nd Session. June, 1829, propounded by Donna Rafaela de
 VIESCA Aramburu, the deceased's sister. By the will of
 against 1814, the brother and sister of the deceased were
 D'ARAMBURU. made residuary legatees of nearly the whole pro-
 perty, and in the event of one dying, in the life-
 time of the testator, the child or children of the
 deceased legatee were substituted. By the will of
 1829, the property was left to the sister only (the
 brother being dead), and in the event of her death,
 to her child or children. She survived the testator.
 Pending the suit at Cadiz, on the 8th February,
 1838, Don José de la Viesca was appointed judicial
 administrator, or administrator *pendente lite*, with
 authority to collect the funds, but without power to
 dispose of any part of them. On the 12th April,
 1838, the sister died, and the children took up the
 suit, which was still pending. Under the circum-
 stances of the case, by virtue of the law of Spain, the
 Court of Cadiz made this provisional order—that,
 as the heirs of the sister were entitled to a moiety
 of the property, after deducting a legacy, (left in
 both wills) of two thousand dollars, at all events,
 the estate should be divided into moieties, whereof
 one should be paid over absolutely to the heirs of
 the sister, and the other should remain in deposit
 till the termination of the suit, the judicial adminis-
 trator, Don José de la Viesca, being re-appointed
 (on the 16th October, 1838), with extended powers,
 to carry the order into effect; letters exhortatory
 being directed to France and England, by the Court

of Cadiz, for the purpose of enabling Don José de la Viesca to receive the funds in those countries. From this order, Don Augel de D'Aramburu, the other party, appealed to a Court of Review, which affirmed the order and condemned the Appellant in the costs, and he thereupon appointed Don José de la Viesca his agent in England, to subduct the caveat which had been entered against the grant of administration here. Don José de la Viesca substituted Sir John Lubbock, as his agent for this purpose, and to take the grant of administration decreed by the Court at Cadiz. In opposition to this, it was set up, that the appointment of Don José de la Viesca, as the agent of Don Augel de Aramburu, to withdraw the caveat, was compulsory,—that it was done by the Court at Cadiz, and that administration ought not to issue.

Addams, in support of the application. The Court has no jurisdiction, except over the sum of money in the hands of Mr. Campbell, with reference to which, it will defer to the foreign law ; and the foreign Court having decided that Don José de la Viesca is entitled to the administration, this Court will grant letters of administration of this property to Sir John Lubbock, his attorney, limited as prayed.

Haggard, in opposition to the grant. It is said, this question depends altogether upon foreign law, and that where there is a sentence of a foreign Court of competent jurisdiction, it is binding upon this Court. But the order of the Court of Cadiz is interlocutory only ; it is a direction pending the

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proceedings, and is not to have the force and effect of a regular definitive sentence. When the Courts of Spain have decided between the will of 1814 and that of 1829, I admit that such judgment will be binding upon this Court; but where there are matters still pending between the two parties, and the case is not *res adjudicata*, it is not the practice of this Court to grant such an administration, without any necessity being stated for it.

JUDGMENT.

SIR HERBERT JENNER.

The administration which has been granted by the Court in Spain, with the consent of Don Angel D'Aramburu (except that he desired another sort of security), appears to be highly convenient, and for the benefit of all parties. The main question, as to which of the two wills is valid, is still pending in the foreign Court; but the Court of Cadiz, confirmed by the superior Court, on appeal, was of opinion that it will be for the benefit of the party who shall be eventually entitled to the property, that it should be secured in the hands of the judicial administrator. I do not know that this order is absolutely binding upon this Court; but if it be discretionary, the Court would be inclined to follow the decision of the tribunal to which all the parties are subject, and which ought to have that which is incidental to the cause, namely, the care and security of the property. The Court has no hesitation in decreeing administration to Don José de la Viesca (represented by his attorney), the judicial administrator appointed by the Court of Spain, subject to the limitations contained in the petition.

CONSISTORY COURT OF LONDON.

Lockwood against Lockwood.

1839.

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2nd Session.

This was a suit for divorce, by reason of cruelty, brought by Lady Julia Lockwood against Robert Manners Lockwood, Esq., her husband. The parties were married, in 1821, at Rome, and cohabited, principally abroad, till October 1834, when they finally separated. The charges of cruelty were detailed in various articles of the libel, the substance of which is stated in the judgment.

On the first session of Michaelmas Term, 1838, an objection was raised on the part of the husband, to the examination of two of the children, a daughter and son, issue of the marriage, as witnesses for the wife, to prove an act of cruelty towards the wife, and the beating of one of the children in her presence. The objection was supported on these grounds:—the tender age of the children at the date of the transaction (the eldest having been only ten years old); that the occurrence was alleged to have happened four or five years back; that the children were in the custody and under the tuition of their mother, and that the Court had a discretion to forbid their examination. On the other hand, it was contended, that the children were competent witnesses, and that, if the party desired their evidence, the Court had no discretion, and must allow them to be examined.

Divorce by reason of cruelty pronounced for, the proof held to be sufficient, although as to several of the articles in the libel there was a failure of proof. The children of the parties being competent witnesses, the Court cannot prevent their production.

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Dr. Lushington.—The Court has no discretion to prevent the examination of competent witnesses, and it is not contended that children are not legal and competent witnesses for or against father or mother. If the wife calls for their evidence, they must be examined, though, at the same time, it is a measure, which, if possible, ought to be avoided.

The main cause was argued in Trinity Term, 1839.

The *Queen's Advocate* and *Haggard* for the wife.

Phillimore and *Addams* for the husband, contended, that the facts proved in evidence, which fell short of the plea, did not amount to legal *sævitia*.

JUDGMENT.

DR. LUSHINGTON,

I esteemed it due to the importance of this case, and necessary also, from the nature of the suit, and the kind of evidence with which it was instructed, carefully to deliberate upon the whole papers, before I finally made up my mind. I conceived that it was not a proper case to be disposed of on first impressions, however strong: the whole evidence requires strict examination.

The suit is brought by Lady Julia Lockwood, for a separation by reason of Mr. Lockwood's alleged cruelty. As to what does or does not constitute cruelty, the decisions of my predecessors in this Court and the Court of Arches, leave no room for further discussion; the only question which can

arise is, whether the facts established in any new case come within the limits already prescribed by precedent. It is quite needless to refer, in detail, to authorities so well known and acknowledged ; all that is necessary to state, may be said in a very few words : “ There must be either actual violence committed, attended with danger to life, limb, or health ; or there must be a reasonable apprehension of such violence.” This I apprehend to be the substance of the doctrine laid down in *Evans v. Evans* (a), cited in the argument in this case, and in other subsequent cases. In applying this doctrine, difficulties of two kinds may arise : first, whether the charges preferred, amount *per se* to legal cruelty ; no such difficulty attends this case, for that some of the Articles in the libel detail charges of legal cruelty, is beyond all doubt. The more usual difficulty, and that which attends this case, is, whether the charges be substantiated by adequate evidence, and that, of necessity, entails the duty of considering, not merely what has been sworn, but how far that evidence is to be credited, and in what respects it is contradicted.

I now proceed to consider the Articles of the libel, and the proof in support of them.

With regard to the *Third* Article, charging Mr. Lockwood with misconduct to procure Lady Julia’s money, there is no proof.

The *Fourth* Article charges Mr. Lockwood with cruelty in 1827. In September in that year, it is alleged that Lady Julia being in Paris, was in a very debilitated state of health in consequence of a

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(a) 1 Hagg. C. R. 35.

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miscarriage, and that it was deemed necessary that she should occupy a bed separate from her husband; that, at such time, he forced himself into her bed and struck her. The two witnesses examined on this Article, are Sir R. Chermshire and Jane Susan Pethoud; but their evidence so entirely fails to substantiate the charge, that I may at once dismiss this part of the case from further consideration.

The *Fifth* Article charges that, during the residence of the parties in the Champs Elysées, which commencing in 1827, lasted (I conceive) for four years, in June 1829, Lady Julia was taken ill, and a miscarriage approaching, Mr. Lockwood compelled her to leave her bed, and go into another room, whereby her life was endangered. Now this Article is wholly without proof as to any part of it which can affect Mr. Lockwood.

The *Sixth* Article relates to occurrences in 1831, whilst the parties were resident in the Hotel de Castries. It charges general illtreatment, and Lady Julia's declarations and complaints to her maid. It is admitted that this Article is without proof.

The *Seventh* Article also relates to transactions said to have occurred at the Hotel de Castries. It pleads that Mr. Lock and his family also resided there, and that he used to allow Lady Julia and her children to occupy his rooms during the day time. It pleads that one day Lady Julia being about to dine with Mr. Lock, Mr. Lockwood seized her roughly by the arm, and swore she should not sit down; that she was in a very weak state of health; that Mr. and Mrs. Lock interfered for her protection, and that that night he kicked her out of bed.

The first witness examined on this Article is Mr. Lock. His examination took place in 1838, seven years after the fact is said to have occurred, and at the time of his examination he was seventy years of age. It is not rationally to be expected that, under these circumstances, he should be able to depose with very minute accuracy. Both the description of the facts to which he was examined, and the interval of time between their occurrence and his examination, and his age, render precision very improbable. He appears to be a witness deserving of credit, from his situation in life, and, so far as appears from his evidence, deposing with a desire to speak the truth and no more. The substance of Mr. Lock's evidence is, that Mr. Lockwood was in a very violent passion, "almost blind with rage," are his words; he does not depose to the use of force or any threat of force. On the fourth Interrogatory, Mr. Lock expresses his belief, but it is his belief only, that Mr. Lockwood was prepared to have dragged her out of the room if she had not clung to the witness; and he adds, that after dinner, he "thought the matter forgotten."

The next witness is Mrs. Lock. Now her statement varies in many particulars from her husband's. She states that Lady Julia first came into her apartment, much alarmed lest Mr. Lockwood should follow her; that she went through and concealed herself in another room; that she (Mrs. Lock) locked the door, and refused to let Mr. Lockwood in, at first, upon his arrival; at last she did; that he shewed very great violence, and broke open two of her doors. This went on till towards dinner, when Lady Julia came in and begged protection of

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Mr. and Mrs. Lock; that Mr. Lockwood, in a violent passion, seized her arm, saying, "you come up stairs with me!" That Mr. Lock interfered, but Mr. Lockwood's rage was such, that he attempted to drag her to the door, and with oaths declared she should not sit down to dinner with them; that the fury of Mr. Lockwood was such, and the terror of Lady Julia so great, that she became apprehensive of serious consequences if she were left alone with him.

The only other witness examined on this Article is the witness Pethoud; but I doubt if her testimony can be brought to apply to it. It is true that on this occasion Mr. Lock does not speak to so many circumstances, nor so strongly, as Mrs. Lock, but I think this is explained in some degree by my previous observations. Mrs. Lock is much the younger person (she was only fifty-seven at the time of her examination), and it is not necessary that Mr. Lock should have been present at the whole of the transaction.

The result then, in my judgment, is, that the testimony of these two witnesses is deserving of credit, and that they do prove gross misconduct and violent and unjustifiable usage on that occasion, and especially considering the state of health of Lady Julia and her sufferings from the Tic Douloureux, there cannot be a doubt in my mind that a repetition or continuance of that treatment might very seriously affect the health of a lady already the victim of so painful a disorder.

It was urged in argument, that the Court did not know the origin of the quarrel. This is true; but I have not, therefore, any legal right to assume

gross provocation, nor could I easily imagine any which would justify such conduct.

I must consider, therefore, this Article to some extent proved; but how far it will avail to call on the Court to decree a separation, must be for further consideration, and depend upon all the facts taken together. It must not be forgotten that, after dinner, Mr. Lock says, he thought the matter was forgotten, and that the parties continued to cohabit as before is an admitted and indisputable fact.

There is no charge preferred against Mr. Lockwood of any thing which occurred from this time till the Autumn of the year 1832. The *Eighth* Article relates to the transactions at Lady Aldborough's, in George Street, Hanover Square; and it will be necessary to examine both the charge and the evidence on both sides with great care.

The Article pleads, first, harshness of behaviour, and that, on one evening, Mr. Lockwood desired Lady Julia to go to bed (and that this was about half past nine, appears from the evidence in the cause); and on her declining to do so, saying that Lady Aldborough had company that evening, he swore she should, and with great violence dragged her by the arm and hair out of the room and up to her bed-room; that Lady Julia's maid, being alarmed, contrived to get him out of the room, and to lock the door; that Lady Julia went into Lady Aldborough's bed-room; that Mr. Lockwood forcibly entered therein, and with great violence pulled her out; that Mr. Gore was present when Lady Julia was pulled out of the drawing-room; that he expressed a strong opinion upon the subject, and that Mr. Lockwood apologised. Now, no

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doubt can be entertained, and it was admitted in the argument, that the facts here pleaded, if sufficiently proved by the evidence in the cause, would amount to an act of cruelty, within the strictest definition of law that can be applied to it.

In the Responsive Allegation, this charge is met by a general denial in the *Seventh* Article, and by a more specific denial in the *Eighth*, which admits a dispute between the parties, and that Mr. Lockwood took Lady Julia up stairs to her own room and afterwards removed her from Lady Aldborough's room to her own; but it ascribes the origin of this dispute to a conversation between Lady Julia and Mr. Gore, said to be very offensive; it denies all pulling by the hair, and all violence, and it denies, positively, all apology to Mr. Gore.

Now one of the most important witnesses brought forward in support of this charge is Mr. Gore, and one of the first considerations to which I must direct my attention is, the degree of credit which ought to be given to his evidence. He is the nephew of Lady Julia by the half-blood, and Mr. Lockwood alleges that there was an unrestricted familiarity of intercourse between them, which he deemed improper; and to substantiate this averment, certain letters from Mr. Gore, addressed to Lady Julia, are annexed, and Mr. Lockwood pleads finding Mr. Gore in Lady Julia's bed-room, she being in bed, and that he strongly censured her thereupon. Now I think no reasonable doubt can be entertained of Mr. Gore being a biassed witness, I may say doubly biassed, from his relationship to and close connexion with Lady Julia, and from his violent dislike to Mr. Lockwood, manifested by the letters

and in the evidence: he is a near relation and a strong partizan. Now how should I deal with such a witness? I apprehend the course I should follow has been repeatedly pointed out by a very high authority on former occasions, where such questions have arisen in these Courts. I well recollect that in the Prerogative Court, in the case of *Constable and Bailey v. Tuffnell*, (a) a strong objection was made to a witness on this ground, and I recollect the opinion expressed by Sir John Nicholl to this effect: that, in matters of opinion, such a witness was to be distrusted; in matters of fact, to be credited: the degree of credit of course being governed by circumstances, namely, the probability of the transaction, and whether the evidence was contradicted or not, and especially the tone in which the evidence was given.

To come then to Mr. Gore's evidence, passing over his description of Mr. Lockwood's general conduct. He deposes in substance to this effect, that without any apparent cause, (for he distinctly denies any offensive conversation taking place between him and Lady Julia), Mr. Lockwood insisted on his wife's going to bed, and that too with oaths; that he seized her by the hair and the arms, and carried her out of the room; that he told him his conduct was cowardly and ungentleman-like; that he afterwards repeated similar expressions, and that Mr. Lockwood burst into tears and desired him to say nothing about it, though he did not directly apologise. On the *Third* Interrogatory, he negatives the previous provocation alleged in

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(a) 4 Hag. E. R. 465, 507

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the Responsive Allegation, and confirms his former evidence, stating, that he was the only person present. Now it is abundantly clear that, unless this evidence be untrue, it cannot be called a high colouring of facts, or misapprehension or misrepresentation; it must be more; it must be a wilful deviation from the truth.

I now then proceed to inquire whether this evidence is corroborated by any other testimony in the cause.

Jane Pethoud is the principal witness, whose testimony, from her long connexion with Lady Julia, and other circumstances, must also be narrowly watched. On the *Eighth* Article, she says she saw Lady Julia with her hair undone and about her shoulders, crying dreadfully, and Mr. Lockwood pushing her behind up stairs; she also mentions Mr. Gore being there at this time, and afterwards details some facts as to Lady Julia locking herself in, and so forth, but no act which could come within the description of legal cruelty. I think it clear that the evidence of Jane Pethoud applies to the same transaction to which Mr. Gore speaks.

There is a third witness, Thomas Pickles, and though there are some discrepancies in minor points, (such as to Mr. Gore's dining there, and as to Lady Aldborough's being present), yet, looking at the lapse of time and the concurrence in more important particulars, I do not doubt that he is speaking to one and the same transaction: indeed, to take it otherwise would rather strengthen the case against Mr. Lockwood. He speaks of frequent contentions; of Mr. Lockwood expressing himself in harsh terms, and, as to this occasion, he says he

saw Mr. Lockwood dragging Lady Julia from the drawing-room up stairs! "He had hold of her by the arm, or rather by the shoulder; he was using violence rather than otherwise; her hair was all down; she was crying violently; Mr. Lockwood said, 'Damn you, I will make you!'"

Now, it was observed in the argument, that Lady Aldborough has not been examined. I see no reason to consider this as an objection applying in any degree to Lady Julia. It was competent to Mr. Lockwood to have examined her just as it was competent to Lady Julia to have examined her, if she thought fit; but there is nothing in the case to shew that it was peculiarly incumbent on Lady Julia to do so. Lady Aldborough was not in any degree more a witness of Lady Julia than she was of Mr. Lockwood. Mr. Lockwood has counterpleaded the Article, and it is impossible for the objection to be urged with any fairness, if he had an opportunity of examining Lady Aldborough, and if he declines to do so, that he should turn round to Lady Julia, and say, "you ought to have examined this witness," whom it was equally in the power of Mr. Lockwood as of Lady Julia to examine.

Looking then at the evidence of these three witnesses, I am of opinion that the accounts of the transaction given both by Pethoud and Pickles, very strongly corroborate the testimony of Mr. Gore, and I am necessarily led to the conclusion that there was personal violence, attended with great passion, and, as I consider, outrageous expressions, for such expressions are spoken to, both by Mr. Gore and by Pickles; the expression par-

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ticularly spoken to by the latter is, "Damn you, I will make you !" and Mr. Gore states that oaths were used by Mr. Lockwood on that occasion. Now, I am of opinion that such conduct does bring Mr. Lockwood within the reach of the authority of this Court, and that such acts as these are a violation of the law, as laid down and acted upon in these tribunals.

I observe here, that Mr. Lockwood's ill-usage on this occasion does not lead to an immediate total separation; the parties continued to cohabit together, (so I must conclude, for it is not pleaded to the contrary) for some time, and I must take all the subsequent circumstances into consideration before I can determine what sentence to pronounce. Although, however, there was not an entire breaking-off of all matrimonial cohabitation, it appears that there had been some arrangement for separate beds, prior to the return of the parties to Paris, in the end of 1833 or beginning of 1834; in the early part of that year they went to reside in the Rue Matignon.

The *Ninth* Article pleads, that whilst Lady Julia was in her bed-room one evening, Mr. Lockwood entered, and seized her by and twisted her arms in a cruel manner; that she rang the bell for assistance, and when the maid came, complained of ill-treatment, and for sometime could not sit down with comfort; and that her health was injured in consequence of this ill-treatment.

Now, the witness Pethoud is examined to establish the facts charged in this Article. If she is to be credited, it is in substance proved; not, indeed, the actual infliction of the violence in the

presence of the witness, but the conclusion of the affray, and the consequences thereof; she finds Mr. Lockwood letting go Lady Julia's arms; she sees the marks there and on her side, where Lady Julia told her Mr. Lockwood had kicked her. She complained, (as the witness says) for some days, and suffered great pain.

This is entirely a question of credit, for no one can say that the facts, if proved, do not establish cruelty. This witness may, as I have already observed, be in no small degree prepossessed in favour of a mistress she had so long lived with. But I cannot, on the consideration of her evidence, say that it is given in a discreditable form; in many instances, she has fallen short of the plea, and I can discern no *indiciæ* of deliberate falsehood and premeditated perjury. The proof as to prior transactions renders this occurrence more probable.

But if any doubt could reasonably remain on the mind of the Court, as to whether this Article be proved or not, I conceive that doubt must be dispelled by the evidence of Dr. Sichel. Though he cannot remember whether he at the time saw the marks of violence on Lady Julia's person, yet he attended her when suffering, and manifestly from the effects of this ill-treatment. As it does not distinctly appear how long after the injury Lady Julia complained to him of the misconduct of her husband, it possibly may be doubtful whether such complaint is direct evidence of the ill-usage. It is a rule and principle of this Court, that where a complaint is made by a wife of injury from a husband *recenti facto*, it is always received as ad-

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missible evidence in these Courts, and for the best of all possible reasons ; because, from the nature of these transactions between man and wife, unless such evidence were received, it would be only necessary for the husband to inflict ill-usage when they were alone, and the wife would be excluded from all possibility of redress. She complains to her maid *recenti facto* : but it does not distinctly appear that the declarations to Dr. Sichel were made *instanter*, at the earliest opportunity ; and, therefore, these declarations may not be direct evidence of the ill-usage. But such declarations are evidence to confirm the statement and credit of Pethoud. Pethoud states that Lady Julia made the complaint to her *recenti facto*, and the fact that Lady Julia made, though not at the same time, a complaint to Dr. Sichel, confirms her veracity. I have no doubt of this : it is no direct proof of the fact, but it corroborates the evidence and credit of Pethoud, if her credit is sought to be impeached.

Looking then at all the circumstances, I conceive I am bound to hold this charge proved ; and, looking also at Lady Julia's state of health and suffering, I think it is both morally and legally an act of cruelty. Suggestions have been made in argument, to account for this ill-usage, suggestions to falsify the evidence ; but they are purely suggestions, unsupported, as I think, by any evidence in the cause.

The *Tenth* Article is the charge which Miss Lockwood alone is produced to substantiate. I do not deem it necessary to examine this evidence with any minuteness. I think, in my view of this

cause, I may without injustice to either party pass it over, giving to Mr. Lockwood the full advantage of considering it not sufficiently proved.

The *Eleventh* Article of the libel need also detain me but a very short time. There is no evidence given in support of it which can possibly affect Mr. Lockwood in this suit.

The *Twelfth* Article refers to a period when the parties occupied a house at Versailles, about the end of September, 1834. It pleads that Mr. Lockwood put himself in a violent passion with his wife, and ran at her with a stick, saying he would "cram it down her throat," that she then jumped out of a window into the garden; that her servant, coming to her for assistance, found her in a very agitated state; that this was followed up by an immediate communication to Mr. Fitzjames.

The witnesses produced to prove the averments in this article are the servant Pethoud and Mr. Fitzjames. Neither of these witnesses saw the principal part of the transaction, though Pethoud saw the conclusion. Lady Julia's declaration to Pethoud is evidence, it may be questionable if the communication to Mr. Fitzjames is so. On the whole, I do not feel myself justified in laying any great stress on this Article.

The *Thirteenth* Article details the circumstances of Lady Julia resolving to quit her husband, taking refuge in the bed-room of Lady Anne Maria Dawson, then on a visit at the house, and pleads, that Mr. Lockwood swore he would go into the room and bring his wife back "by the scuff of the neck;" that he was prevented from doing so by the interference of Mr. Fitzjames.

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Before proceeding further with the remainder of this Article, it may be expedient to see whether this part be proved. It may not be an unimportant consideration, for it is not distinctly pleaded that this was the termination of all matrimonial cohabitation. Lady Anne Maria Dawson states the fact of Lady Julia coming into her room in a state of great agitation, saying that Mr. Lockwood had ordered her to go back with him to Paris in the course of half an hour, that she might as well cut her throat as do so. Lady Anna Maria Dawson then accompanies Lady Julia to St. Germain, to her brother's, Colonel Dawson Damer. The evidence as I have stated it, does not prove any misconduct of Mr. Lockwood in the presence of the witness; it only shews the strong impression made on her mind by the statement and appearance of Lady Julia. Mr. Fitzjames was present at the earlier part of the transaction, and he deposes to Mr. Lockwood's threatening to pull his wife out "by the scuff of her neck," and to his own interference for her protection. He further describes Mr. Lockwood's agitation on finding that Lady Julia had actually quitted his roof and taken shelter under another; to his admission that he had been very much to blame; to his declaring "that he had been a brute to her," and his willingness, if she would return, to engage not to subject her to any personal molestation.

Now, looking at all that had preceded this occurrence, to the acts of violence into which Mr. Lockwood had suffered himself to be betrayed on former occasions, the state of suffering health in which Lady Julia was, the language used in this

instance, I think Lady Julia had reason to be alarmed for her personal safety, and that, for the sake of her health and security, she was justified in quitting her husband's house. I cannot think that Mr. Fitzjames's evidence is at all shaken; it is confirmed, in some degree, by letters, and by the whole *res gestæ*. It is said that he is a near relative of Lady Julia, and by a suit for a separation, he may ultimately succeed to certain property. But it appears to me that there is no valid objection against his testimony, which, as I think, is corroborated by Mr. Lockwood himself, in what I am now about to advert to.

By a document in Mr. Lockwood's own handwriting, (the exhibit A) Mr. Lockwood consents, on Lady Julia's demand, to a species of separation; to an arrangement with respect to herself and children, to his own exclusion from his own house. I do not go the length of saying that this document admits ill-usage on his part; but I must say it is most consistent with, and corroborative of, the statement of Mr. Fitzjames, for he would not have signed such a paper as this, consenting to his own exclusion, unless he had thought some blame at least was attributable to himself.

To follow up this history: for some short time Lady Julia resided under the roof of Mr. Fitzjames, at Versailles, and then, in consequence of an arrangement, she returned to Paris, and, Mr. Lockwood being excluded, occupied the house in the Rue Matignon. It is shortly after this, that Lady Julia presents a petition to the French Court. The contents of this petition are in no way evidence against Mr. Lockwood, and I only refer to the fact

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as a part of the history, drawing from it no inference unfavourable to Mr. Lockwood.

The *Seventeenth* Article states a transaction of the year 1835, when Mr. Lockwood came into his wife's presence, and some violence of behaviour towards the maid; but it is only of importance as showing generally an excitable temper, and that he deemed himself not bound, at least altogether, by the terms of the agreement.

But I have hitherto confined my observations to the charges preferred by Lady Julia, and the evidence relating thereto; but before I consider the last circumstance pleaded in this libel, namely, the occurrences at Tunbridge Wells, I must advert to Mr. Lockwood's plea and evidence. It will not occupy any considerable space of time, for the evidence is very short.

The allegation may be divided into three parts. The first is defensive against the charges preferred, and not a single witness is examined in support of any one of the averments. The second part is accusatory of Lady Julia, and many documents are appended to prove the averments, but no witness is examined, save as respects her conduct towards the children. The third part relates to the negotiations and references for a separation.

Perhaps it will be better to consider the last head first. It appears, from the evidence of Mr. Vernon Lockwood, (though he is only able to depose on the subject in general terms), that after he had in vain attempted an arrangement, some agreement was come to between the parties for a separation on certain pecuniary terms. This agreement is proved by Mr. Baker. But as related to the edu-

cation of her son, Lady Julia declared she could not comply with the terms. In the year 1837, a reference was made to the Earls of Aberdeen and Wicklow, Colonel Stopford and Mr. Vernon Lockwood. Their object was to promote a reconciliation. No. 2 contains the propositions agreed to by the referees. They recommended a reconciliation, but until that be accomplished, they advise the separation to continue on the terms, pecuniary and otherwise, contained in that document. With regard to this award, if it is proper to be so called, Lord Aberdeen speaks in nearly the same terms as Mr. Lockwood, save that he says the proposal was not to be considered binding unless both parties were willing to accept them.

Now, what view can I take of this transaction which can possibly affect my judgment on the case? What does it prove? As to the conduct of either party personally towards each other, it does not in the remotest degree prove anything. All that possibly can be extracted from it adverse to Lady Julia is, that she refused to consent to a separation on pecuniary terms which were reasonable, or were deemed so by her own friends; that having the larger share of the joint property, she is too anxious unreasonably to retain it. But assuming all this, it cannot affect my judgment on the points which I have to decide; even if I were convinced that one of the chief objects of the suit, on the part of Lady Julia, was to retain her own fortune, it can affect a legal judgment, as to the cruelty, very remotely, if at all.

I am now come to consider the misconduct imputed by Mr. Lockwood to Lady Julia. No abso-

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lute criminality is ascribed to her; indeed, the prayer that the Court will order her to return home to cohabit with Mr. Lockwood, is the strongest disclaimer of any such charge of criminality. But she is accused of flirting, and "of levity of manner and of impropriety of conduct towards gentlemen." This levity of manner and impropriety of conduct towards gentlemen is stated to have been the cause of angry discussion between the parties, and, amongst other things, to have led to Mr. Lockwood's prohibiting her from dining with Mr. Lock. But in what way is this charge substantiated? A great part of it was in its nature capable of proof; her levity of manners, her impropriety of conduct, must have been visible; the friends and acquaintance of the family might have proved its existence; there must have been some disputes which shewed that quarrels had arisen, which could only have originated from such a source. But there is not a single witness produced to substantiate the charge, not one. Am I to take the letters as a proof? A proof of what? Of levity of manners and impropriety of conduct towards gentlemen? What is the meaning of the plea? The plea must mean, and can only mean, acts done towards and in the presence of gentlemen; that must be the meaning of the terms, that this lady's conduct was not such as it should have been in the company of gentlemen. Of such an averment, the letters are no evidence whatever.

But I shall not shrink from expressing my opinion of these letters. If such a correspondence was secret and clandestine; if accidentally discovered during cohabitation, I think it would have afforded

the husband some just ground of offence. Not that these letters denote in any degree a departure from purity of conduct on the part of Lady Julia, but because it is, in my judgment, not altogether consistent with the strict prudence which husbands have a right to require, and most do require, from their wives; because, however innocent in its origin, such intimacy leads to danger. It is said, this correspondence was clandestine; was it so in the proper sense of the term? I can find no evidence of this. But assuming it was so, it might possibly cast some blame on Lady Julia, but as it was unknown to her husband, it cannot in any degree extenuate his violence; for if it was not discovered till her visit to Tunbridge Wells in 1838, it could have had no operation on his preceding conduct. I cannot conclude this branch of the case without observing, that though no witness have been produced to substantiate the charge of levity of manner and impropriety of conduct towards gentlemen, yet that interrogatories to that purport have been addressed to several of the witnesses, all of whom have negatived the accusation in the most decided terms.

The last remaining circumstance, which requires notice, is the proceeding of Mr. Lockwood forcibly to enter and take possession of the house Lady Julia was residing in at Tunbridge Wells, after a separation *de facto* of above three years. I think this proceeding wholly unjustifiable; I know of no right which, under the circumstances, a husband possesses to take the law into his own hands, to supersede the established tribunals, and to attempt to do

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himself what he thinks justice by force of arms. If such measures are permitted, suits for the restitution of conjugal rights may at once be abolished, and the *ipse dixit* of the husband substituted for the decree of a court of justice, the husband being his own judge and executing his own sentence. One of the most certain consequences of such proceedings might be a breach of the peace.

Reviewing, then, the whole history detailed in the proceedings, and endeavouring well to weigh and give its due force to all the evidence, I am of opinion that the *Seventh, Eighth, Ninth, and Thirteenth Articles* are proved; that the prayer of Mr. Lockwood that I should order Lady Julia to return to cohabitation with him must be rejected, and a decree pronounced in her favour. I think personal ill-usage has been proved; that, considering Lady Julia's state of health and acute suffering, at least occasionally, the effect of such ill-usage might be expected, and reasonably expected, seriously to endanger her health, already impaired by disease; that, such ill-usage being repeated more than once, it is my duty to give her the protection of the law, and release her from all chance of further ill-treatment. I avail myself gladly of the opportunity of declaring my opinion, that this is not an aggravated case of constant, and deliberate, and brutal ill-usage; but it has unfortunately happened, probably from that irritability of temper described by his brother, Mr. Vernon Lockwood, in his evidence, that Mr. Lockwood has occasionally lost the command over himself, and, when under the sway of passion, has been led to the commission

of acts which render further cohabitation unsafe, and entitle Lady Julia to the protecting interposition of this Court. I, therefore, pronounce in favour of Lady Julia's prayer.

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The citation called upon Cooper to appear and answer to certain articles, &c. touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses, touching and concerning his office of Churchwarden, and more especially for having, at a vestry meeting duly holden on the 31st of January, 1839, in the said parish, for the purpose of making a church-rate, in pursuance of a notice published according to law, *voted* in favour of a resolution then and there moved and seconded, such resolution being in the words following, to wit: "That this vestry, considering church-rates at all times bad in prin-

At a vestry meeting called, by notice signed by the churchwardens for the purpose of making a church-rate for the repair of the church, a resolution was moved and seconded, "That this vestry, considering church-rates at all times bad in principle, and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called, till this day twelvemonths," which resolu-

tion was carried. *Held*, that one of the Churchwardens, in having voted in favour of the resolution and against the rate proposed (of two-pence in the pound), was not guilty of any ecclesiastical offence—it not being averred that in consequence of the refusal of the rate, the church was still out of repair.

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ciple, and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called till this day twelvemonth ;" and also for having, at the said meeting, voted against a church-rate then and there duly moved and seconded ; and further, to do and receive as unto law and justice shall appertain under pain of the law and contempt thereof, &c. &c.

An appearance being given and Articles prayed, they were given in.

The Articles were as follow :—

(The heading of the Articles followed the citation.)

First.—We Article and object to you, the said Job Cooper, that, previous to and in the month of January last past, the roof of the nave of the parish church of Shepton Mallett, in the county of Somerset and diocese of Bath and Wells, was in so dilapidated a state, that the rain came through the same into the body of the said church, to the serious detriment and injury of the fabric, and also of a valuable organ in the said church, and to the great inconvenience of the officiating minister in the said parish church, who, on one occasion, on account of the rain so coming therein, was prevented from reading prayers in the reading-desk, and of the congregation of the parishioners and others from time to time assembled in the said parish church, and this, &c. &c.

Second.—Also, &c. that, in consequence of the premises mentioned in the next preceding Article, a vestry meeting, agreeably to a notice in writing signed in duplicate by Charles Wainwright and by you, the said Job Cooper, then and now the Church-

wardens of and for the said parish of Shepton Mallett, was duly holden on the 31st of January last past, in the vestry-room of the said parish church, for the purpose of making a church-rate towards effecting the repairs of the said church, and for expenses necessary for the due administration of Divine Service, and incident to the office of Churchwarden; that the said meeting having adjourned to the school-room, belonging to the national school, in the said parish, certain estimates were laid before the said meeting, by the said Charles Wainwright, whereupon a resolution was then and there moved and seconded respectively by two dissenting ministers in the words or to the effect following, to wit: "That this vestry considering church-rates at all times bad in principle and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called till this day twelvemonths;" that, notwithstanding the premises, you, the said Job Cooper, then and there, in violation of the laws, statutes, canons, and constitutions ecclesiastical of this realm, and of your duty and obligations as Churchwarden, and what is fitting and right to be observed in respect thereof, and to the evil example of others, voted in favour of the aforesaid resolution, and then and there also voted against a church-rate of two-pence in the pound, then and there duly moved and seconded (as an amendment to such resolution respectively), by the said Charles Wainwright and by Alfred Gale, a parishioner and inhabitant of said parish. And this, &c. &c.

Third.—The third in supply of proof, pleaded a

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duplicate of the notice for the vestry meeting, signed by Mr. Cōoper, also a copy of the estimates.

Fourth.—That at the close of the poll for and in respect of the said resolution and amendment, a scrutiny took place, when you acted as a scrutineer on behalf of the said resolution, and that the said resolution was carried by a majority of thirty-seven, the numbers being in favour of the said resolution, and against the rate 235 and 198 in favour of the amendment and for the rate ; that the said resolution, amendment, and result of the poll were correctly entered in the vestry-book of the said parish, and that the said book will be produced at the examination of the witnesses and at the hearing of this cause, if required. And this, &c. &c.

Fifth.—Also, &c. that at and during the premises, you were and still are an inhabitant and one of the Churchwardens of the parish of Shepton Mallett aforesaid, and therefore, and by your appearance to the citation in this cause, you were and are subject to the jurisdiction of this Court, and that by reason of the said premises you have incurred ecclesiastical censures, and that you have not undergone any punishment for the same. And this, &c. &c.

Sixth and Seventh—Usual Articles.

The Articles were admitted in the Court below, which constituted the grievance of which the party proceeded against complained.

Addams and *Curteis*, for the appellant. The party proceeded against has been guilty of no ecclesiastical offence ; he did not vote for the resolution, or against church-rates generally, but against this particular rate, which a Churchwarden may

legally do, if he think the rate excessive or unnecessary. The appellant must be dismissed with his full costs.

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Haggard and *Jenner* for the respondent. It is expressly pleaded, that the appellant voted for the resolution, and this was contrary to his duty; for a Churchwarden is bound to keep the church in repair, whereas, although he brought forward an estimate of the cost of necessary repairs for the church, he voted against a rate; for the adjournment for twelvemonths was held equivalent to a refusal in the *Leicester* case. (*a*)

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JUDGMENT.

SIR HERBERT JENNER,

The present is a proceeding somewhat novel in its circumstances. The principles are sufficiently familiar to us, and perhaps will be for sometime to come; for questions of church-rate, and of refusals of church-rate, have lately become pretty frequent.

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The appellant in this case, when cited to appear before the Court of Wells, did appear absolutely, and prayed Articles, which were accordingly brought in, and admitted by the Chancellor of the diocese of Bath and Wells; from the admission of the Articles, an appeal was brought to this Court, and the question to be decided by it is, whether the Chancellor of Bath and Wells acted rightly or otherwise in admitting these Articles.

Now upon reading the citation in the cause, it

(*a*) 8 Adol. & Ell. 889.

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did appear to me that there was something novel in the citation itself, for it called upon the Churchwarden to answer to certain articles, &c. “touching and concerning his office of Churchwarden,” and undoubtedly as Churchwarden he was amenable to the jurisdiction,—“and more especially for having, at a vestry meeting duly holden, for the purpose of making a church-rate, voted in favour of a resolution then and there moved and seconded, such resolution being in the words following, to wit: ‘That this vestry, considering church-rates at all times bad in principle, and particularly unjust in practice, and quite uncalled for at the present time, resolved to adjourn all further consideration of the subject for which it has been called, till this day twelve-months:’” and also for having, at the said meeting, voted against a church-rate, “then and there duly moved and seconded.” I confess, when I read this citation, it did appear extraordinary that the party should be called upon to answer for having voted for these resolutions, without stating the consequences which followed therefrom; without stating the necessity of the rate; that the repairs of the church have been neglected by its refusal, or even whether the resolution was carried or not. If this had been an original proceeding before me, if I had been asked to allow my office to be promoted against the Churchwarden here, for an ecclesiastical offence, I should have hesitated a long time before I granted the application, on a statement so loose and indefinite. I am yet to learn that a Churchwarden may not vote for such a resolution, or against a rate, unless that vote produces consequences which it is his duty to prevent, namely,

that the church became dilapidated, for want of the repairs for which the rate was proposed and refused. I do not know that it is any breach of ecclesiastical discipline, as far as the Churchwarden is concerned, to vote for the resolution as it stands, though it may be an indecent, improper, and obnoxious one; I do not know that it is an ecclesiastical offence, for which the party is amenable to the Ecclesiastical Court, to vote for such a resolution, if it be not followed by the consequence of the church being left in a state of dilapidation. I do not see that any ecclesiastical offence is charged in the citation; it is a mere abstract proposition, that the party voted for a certain resolution and against a church-rate, without stating the consequences of the vote. If such a citation issued, I should have thought that the most ready way to meet it was, not to abstain from appearance, but to appear under protest, denying that any ecclesiastical offence had been committed; and if there had been an appearance under protest, and it had been overruled in the Court below, and an appeal had been prosecuted to this Court, I should have had no hesitation in reversing the decree, for it is impossible, on the face of the citation, to say, that it alleges an ecclesiastical offence, for which it is competent to the Court to inflict ecclesiastical censure, and to follow it up with condemnation in costs. However, it appears that the party in the Court below, acting under the advice of those whom he consulted, gave an absolute appearance to the citation, and prayed Articles. The citation is dated 1st April, 1839; the party is cited to appear on the 16th of April, and he does not appear till the

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30th (which I apprehend was the next Court-day but one after the return), and he prays Articles. The Articles themselves, so far as I collect, were not brought in till the 18th June, the offence (if any) having been committed on the 31st January; the citation being dated two months after the offence, and the appearance being given for the party on the 30th April, the Articles are not brought in till the 18th June. I must say that there has been great delay in the proceedings; and considering that five or six months elapsed after the offence (if any) was committed, before the Articles were brought in, it is possible that circumstances may have occurred in the intermediate time to shew that the consequences which might have followed from the refusal of the rate had not ensued.

Now what happens when the Articles are brought in? The citation merely sets forth the fact that the Churchwarden voted for the resolution and against the rate, the offence being two-fold. The heading of the Articles is in the same form as the citation—so far the rules of the Court have been complied with. The first Article merely pleads, that, in January last, the roof of the nave of the church was out of repair, and there it ends; but I do not find that the church still remains out of repair as it was in January 1839. However, the Article, standing alone, is a proper Article to be pleaded, and is not inconsistent with the citation, though it stops short, and does not state that the church is still in need of repair.

Now the church being in this want of repair, it was necessary to consider what was required to be done to it, and, accordingly, it is next pleaded,

that a vestry was called by the Churchwardens (the party proceeded against being one), and was duly held on the 31st January, for the purpose of making a rate for the repairs of the church, and other purposes, (a very proper proceeding by the Churchwardens, and so far Mr. Cooper acted in pursuance of his duty), and an estimate was laid before the vestry by the other Churchwarden, when a resolution for adjourning the consideration of the subject for a twelvemonth, was moved and seconded by two dissenting ministers; and undoubtedly I have no hesitation in saying that this resolution is equivalent to a denial of the rate, and if any consequences had followed, that is, if the repairs of the church could not be performed, I should have held that the persons who voted for it, and particularly this Churchwarden, would have been amenable to the Ecclesiastical Court for neglect of their duty. But the Article goes on to plead, that the party cited, "in violation of the laws, statutes, canons, and constitutions ecclesiastical of this realm, and of his duty and obligations as Churchwarden," and so forth, voted in favour of the resolution and against a church-rate of two-pence in the pound. Here the Article stops and the case remains as in the first Article.

The fourth Article pleads, that at the close of the poll, a scrutiny took place, the party cited acting as scrutineer on behalf of the resolution which was carried, and the rate negatived. But the question still remains, is any ecclesiastical offence charged against the Churchwarden? Is the refusal of the rate itself, at the vestry called for the purpose of making a rate, an ecclesiastical offence? for I take

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both the facts together, the resolution to adjourn the matter for twelvemonths, and the refusal of the rate, as one and the same thing; although some offensive words are introduced, as to the character of church-rates, it is one and the same offence; it is a refusal of the rate, not only of two-pence in the pound, but of any rate whatever: is that an ecclesiastical offence in a Churchwarden calling a vestry to make a rate? No case has been cited of a proceeding in these Courts under similar circumstances, where a Churchwarden was cited for having voted against a rate and in favour of a resolution against church-rates altogether. I can well understand, that if the consequence of the resolution being carried, and of the rate being refused, had been that the church became dilapidated, a Churchwarden so proceeding would be amenable to the Ecclesiastical Court for such misconduct, and punishable by Ecclesiastical censure and costs. But here the Court is in the dark. It is merely stated that, in January last, the church was in a state of dilapidation; it is not stated that it remained so at the time the citation was served; on the contrary, it is perfectly consistent with the Articles, that the church had been put into decent repair, and the necessary articles and elements had been provided for Divine service. In a criminal proceeding, the Court is not to conjecture or presume any thing; and if it could, I am not able to presume that the repairs have not been done, or that the different articles necessary for Divine service have not been provided; I am left quite in the dark. I agree that it is the duty of the Churchwardens not only to apply the funds (if there

are any in their hands), to the repairs of the church, and to the providing of articles necessary for the decent performance of Divine service, but that if they have not funds, they are bound to take every step they legally can to procure funds; and in order to exonerate themselves from the charge of neglect of duty, they are bound to shew that no fault is imputable to them, and that if they had no funds, they have taken all legal steps to procure funds; but I must be informed what was the consequence of their not doing so. It has been said that, *prima facie*, there is an admission on the part of Mr. Cooper that funds were wanting. But this is not so; it was proper that the necessity of the repairs should be considered, and that the estimate of the expense should be discussed. The estimate might be considered too much, and the vestry might think a smaller amount sufficient for the purpose. I cannot conceive that the Court is at liberty to go beyond the citation and Articles, and I consider it a question of considerable doubt whether the Articles are in sufficient conformity with the citation, for the citation simply states that he voted for a certain resolution, and against the rate; and I will not say that a Churchwarden may not do so without being liable to Ecclesiastical censure, (however proper it may be that he should remain neutral on such occasions), or that it would not be an assumption of power in the Court to censure a Churchwarden for voting in favour of a resolution that "church-rates are at all times bad in principle and particularly unjust in practice," though he is bound to put the church in proper repair; for he is not punishable for expres-

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sing such a conscientious opinion, unless the consequence followed that the church fell into a state of dilapidation; I do not think this Court could proceed to punish a Churchwarden merely for a vote embodying a proposition which he believes to be true. The question here is, whether the church is out of repair in consequence of the resolution, and of the rate being refused? In all cases of criminal proceedings, the charge should be fully stated in the citation, that by the refusal of the rate, and through the neglect or misconduct of the Churchwardens, the church is not in a sufficient state of repair. I am the more inclined to hold this doctrine, because, in a late case, that of *Millar and Simes v. Palmer* (a), all the circumstances were set forth, and it was specifically pleaded that the church still remained in consequence, in a state of dilapidation.

Under these circumstances, I am not prepared to say that there is such an Ecclesiastical offence charged in the citation or in the Articles as an Ecclesiastical Court can visit with Ecclesiastical censure and costs; I am of opinion that the Articles ought not to have been admitted in the Court below, and I pronounce for the Appeal and reject the Articles.

It has been argued that the respondent is bound to pay the costs in both Courts. I am not of that opinion; I think the party lost his way in not appearing under protest, and if he chose to give an absolute appearance and to pray Articles, I think the expense of the Articles should fall upon him.

(a) Vol. 1, p. 540.

But I think he is entitled to his costs in this Court, where he was under the necessity of appearing, and where he has had the sentence reversed. I am of opinion that the Articles must be rejected, and that the party promoting the Office of the Judge must be condemned in the costs of the appeal.

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WARNER *against* GATER.

This was a question as to the admission of the libel with additional Articles, in a cause of subtraction of church-rate, by the Churchwarden of Botley, in Hampshire, against a parishioner. The suit was brought by letters of request from the Chancellor of the diocese of Winchester. The rate was made for defraying the expense of consecrating a new parish church, the old edifice having been pulled down in order that it might be rebuilt on a more convenient site. The libel had come on for admission in Trinity Term, (29th of June), when the case was directed to stand over for the production of the sentence of consecration, and in order to ascertain whether it was done under the authority and within the provisions of the Church Building Acts; the additional Articles now pleaded, that the resolution for pulling down the old church and building a new one had passed unanimously; that half the additional accommodation in the new church had been set apart for free and open sittings, and that the consent of the rector,

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—
A church-rate for defraying the expense of the consecration of a church, rebuilt under the stat. 59 Geo. 3, c. 134, s. 40, valid, although no faculty had been granted.

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ordinary and patron had been obtained, as required by the act.

Phillimore and *Addams*, against the rate. The question is, whether this rate can be sustained? It is admitted that no faculty had been granted for pulling down the old church; the statute of the 59 Geo. 3, c. 134, s. 40, under which it is now said the church was rebuilt, does not dispense with a faculty, supposing the Court to be satisfied that the church was rebuilt under the Church Building Acts, the object of which was the building of "additional churches." It is submitted further, that the notice given of the vestry meeting was not sufficient, the notice being "for making of a church-rate and other purposes."

The *Queen's Advocate* and *Nicholl* in support of the rate.

JUDGMENT.

SIR HERBERT JENNER.

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I think it now perfectly clear that the proper consents were obtained, within the 40th section of the Act, and that the libel and the additional Articles are proper to be admitted.

The libel pleads, that on the 26th March, 1835, a vestry meeting was held pursuant to notice, when it was resolved to take down the old church and rebuild a larger church nearer to the body of the village, and that in pursuance of this resolution, a new church, affording better accommodation to the parishioners, was built on a more suitable site, the expense being borne by a subscription, aided by

the Church Building Society; that on the 22nd August, 1836, the new church was consecrated, and was resorted to by the parishioners as the parish church; that on the 18th August, (prior to the consecration), a vestry meeting was called by regular notice, to make a rate for general church purposes; that a rate of one shilling in the pound, to meet the expenses of opening the new church, was agreed to; that the greater part of the inhabitants had paid the rate, and that Mr. Gater had been duly assessed in 10*l.* 9*s.* 5*d.*, and had refused to pay the same.

When the libel was before the Court on the former occasion, some important questions arose, as to the authority of the parish to pull down and rebuild the church; whether or no a faculty was requisite; and these questions were a good deal discussed; and the Court, considering that difficulties might arise, and that it might be exceedingly inconvenient if it held the opinion that in this case a faculty was necessary for the transfer of the parish church to a different site, suggested whether it might not turn out that it was done under one of the Church Building Acts, which might take it out of the usual course of the general law. Accordingly, inquiry has been made, and this turns out to be the fact, and additional Articles have been brought in, pleading, that the consents of the necessary parties had been obtained, letters from the bishop of the diocese (the ordinary), and from the patron of the living being annexed, and the incumbent having been himself the chairman at the vestry, and the other conditions of the 40th section of the 59 Geo. 3, c. 134, having been complied

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with. What does the act provide? That the Churchwardens, with the sanction of the vestry and the consent of the ordinary, the incumbent, and the patron, (there being no lay impropriator here), may pull down and rebuild the church on the same or another site. They got the consent of the vestry by the vote; the consent of the ordinary and of the patron are also obtained, and the incumbent was chairman of the meeting; and it also appears, from the additional Articles, that half of the additional accommodation has been set apart as open sittings, so that it seems to me that all the provisions of the act of Parliament have been complied with, and that this church has become the parish church of Botley.

Then the question is, whether the rate was properly made or not? The first objection is, that there was not sufficient notice of the purpose for which the vestry was assembled; it was "for making of a church-rate and other purposes." Certainly there is no specification of the exact object or purposes to which the rate was to be applied; but there is a notice that the meeting was to be for the making of a church-rate, and it is hypercritical to say that every particular circumstance and object is to be stated in the notice. Mr. Gater was present at the meeting, and he proposed a rate of a fourth part of what was proposed by the Churchwarden; but a shilling rate was carried by a large majority of the vestry, for the purpose of making provision for the consecration of the church. I am of opinion, therefore, that the notice was sufficient, and that no one could have been taken by surprise.

Now, the rate was for the consecration of the parish church, and it could not be a parish church till it was consecrated, and I should be glad to have it pointed out to me by whom the expense of consecration was to be defrayed. There is nothing in the resolution of the vestry that it should be defrayed by voluntary subscription. If the church had been rebuilt on the same site, still it would not have been a parish church till it was consecrated, and the parish must have been charged with the expense of consecration of such a church. I am of opinion that a rate for consecration of the church is one which it was incumbent on the parishioners to make, and being carried by a large majority of the vestry, (all but two), I think it is a legal and valid rate, and that every parishioner is bound to contribute to it; and being of opinion that it is a good and valid rate, legally and validly made, I shall hold, if the facts stated in the libel are proved, that Mr. Gater is liable to the rate. I, therefore, admit the libel and additional Articles.

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PREROGATIVE COURT OF CANTERBURY.

1839.

MICHAELMAS
TERM.
Dec. 4th.
4th Session.

NEWTON and THOMAS *against* CLARKE.

A testator intending to execute a codicil, signed the same while lying in bed, there being present in the room the two witnesses who attested the codicil; the curtains at the foot of the bed being drawn at the time, one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribe the codicil as attesting it:
Held, that the testator and the witness signed their names in the presence of each other, as required by the stat. 1 Vict. c. 26, s. 9.

THIS was a question as to the admission of an allegation, propounding a paper as a codicil to the will of Mr. Patrick Persse, who died in June 1839. The question was, whether the codicil was duly executed under the statute 1 Vict. c. 26. It was alleged, that on the 8th of April, 1839, the deceased, being then confined to his bed, directed his nephew, who was the residuary legatee in the will, to prepare a codicil, increasing the legacy of a servant from 60*l.* to 100*l.*, which he prepared accordingly, and brought to the deceased in his bedroom, which was small, the bed standing with the foot towards the fire-place. During the execution of the codicil by the deceased, the curtains of the bed were drawn open on both sides, but closed at the foot of the bed. Two small tables were in the room, one at the foot and the other at the side of the bed. When the nephew returned with the codicil (which he had prepared in another room), into the deceased's bed chamber, he read the same over, in the presence of White, the deceased's footman, Clarke, the servant whose legacy was increased by the codicil, and the nurse to the deceased, who in their presence and hearing, expressed his approbation thereof; the deceased then signed the co-

dicil, in the presence of the same persons, except that one of them (White the footman), did not actually see him sign the paper, as he was standing by the fire, where the curtains of the bed were closed. The nephew then subscribed his name, as attesting the execution, and proposed that White should do the same; previous to which, he again read the paper to White, in the presence and hearing of the testator. White then attested the codicil, signing it upon the small table placed between the foot of the bed and the fire, where the curtains were still closed, so that the testator might not have seen him sign.

The *Queen's Advocate* and *Haggard* opposed the allegation. The question is, whether this is a good execution under the 9th section of the Act, which requires that the signature of the testator shall be made or acknowledged in the presence of the witnesses, who shall subscribe the will in the presence of the testator, the intention of the statute being that the testator and the witnesses should see each other sign their names. Under the Statute of Frauds, a constructive presence was allowed, but in the cases determined under that Act, it was held, that the testator should be in such a situation that he might see the witnesses. In the present case, the witness was not within the reach of the organs of sight of the testator. *Shires v. Glascock* (a), *Casson v. Dade* (b), *Doe dem. Wright v. Manifold* (c), *Winchilsea v. Wauchope* (d), (the Duke of Roxburgh's

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(a) 2 Salk. 688.

(b) 1 Bro. Ch. Cas. 98.

(c) 1 Maule & Selw. 294.

(d) 3 Russ. 441.

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will), where the Master of the Rolls said, "the Duke might have seen what the witnesses were doing." Here the witness and the testator could not see each other.

Addams and *Robertson*, in support of the allegation. The whole question turns upon the word "presence." The statute does not require that the testator should actually see the witnesses sign; the cases referred to, turned upon the question of constructive presence; here the persons were in the actual presence of each other; if they are in the same room, that will satisfy the Act. In *Tod v. Winchilsea* (a), Lord Tenterden held, that it was not absolutely necessary that the testator should see the witnesses, since he might be blind.

JUDGMENT.

SIR HERBERT JENNER.

The word "present" occurs in the Statute of Frauds, and the meaning of that word has been a subject of discussion in the cases referred to. In the present case, the first consideration is, under what circumstances the execution took place. It took place in the chamber where the deceased lay, which was small (not a large one, where he could not see what was going on), and the probability is, that all that was going on was heard by the deceased, the bed curtains being open on both sides, and only closed at the foot, to screen him from the fire. All the other requisites of the Act were complied with, but it is said White could not see the testator

(a) 2 Carr. & P. 491.

sign his name, nor the testator see him attest his signature. To be sure it appears somewhat strange to say, that what was done by a person in the same room, and in the hearing of another person, was not done in his presence. As far as the words of the Act go, I should be of opinion, without reference to the cases, that the witness being in the same room, was present. The object of the Act is to prevent the substitution of another paper, and that no fraud should be practised on the deceased. I should, therefore, hold, that this is a sufficient attestation in the presence of the testator, and a sufficient compliance with the Act of Parliament. The several cases referred to, were questions under the Statute of Frauds, where wills were attested in a different room from that where the testator was. In one of those cases, (that of *Casson v. Dade*), the doctrine of constructive presence was carried to a great length, for the testatrix executed the will in her carriage, standing at the office of her solicitor, the witnesses retiring into the office to attest it, and it being proved that the carriage was accidentally put back, so that she was in such a situation that she might see the witnesses sign the will through the window of the office; and this was held to be tantamount to being present: she had not ordered her carriage to be put back, and yet it was held that the attestation was constructively in her presence. In this case, no suspicion of fraud can be suggested; the party employed the residuary legatee to prepare the codicil, and he will be a sufferer to the extent of the legacy.

I am of opinion, that under the Act, where a paper is executed by the deceased, in the same

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room where the witnesses are, and who attest the paper in that room, it is an attestation in the presence of the testator, although they could not actually see him sign, nor the testator actually see the witnesses sign; and if the facts pleaded in this allegation are proved to the satisfaction of the Court, I must pronounce for the validity of the codicil.

Allegation admitted.

The executors afterwards took probate of the codicil.

In the goods of CATHERINE ELIZABETH
THICKNESSE WOODINGTON, Widow, *deceased*.

On Motion.

1839.

HILARY TERM.
Jan. 16th.

Probate allowed of a will concluding "signed and sealed as and for the will of me C. E. T. Woodington, in the presence of us, Thomas Hughes, Ellen Hughes," as being signed at the foot or end thereof.

The testatrix died in November, 1838, having on the 28th of May preceding made her will, which concluded in the following manner:—

"Signed and sealed as and for the will of me,
Catherine Elizabeth Thicknesse Woodington,
in the presence of us,

"THOMAS HUGHES,
"ELLEN HUGHES."

Pratt moved for probate of the will, as having been duly executed under the 9th section of the stat. 1 Vict. c. 26, upon the affidavit of Thomas

Hughes, one of the attesting witnesses, who deposed that the deceased wrote her name in the manner as it appeared on the instrument in his presence only, but afterwards on the same day, the date of the will, in his presence and in that of the other subscribed witness, acknowledged the will to be her will, and to have been written by her; and that he believed that the names of the deceased as there so written, were intended by her as and for her signature to the will, and that he and Ellen Hughes, on the same day attested and subscribed the will, in the presence of the deceased and of each other.

1839.

HILARY TERM.
Jan. 16th.

In the goods of
WOODINGTON,
deceased.

SIR HERBERT JENNER.

The deceased, by placing her name where it stands, seems to have intended that it should answer the purpose of a description as well as of a signature, and such signature being at the foot or end of the will, and the will being written by the deceased, and acknowledged by her to be her will in the presence of the two subscribing witnesses, I think this is a sufficient acknowledgment of the signature to the will to satisfy the provisions of the statute.

In the goods of **ELEANOR BRYCE**, Spinster, *deceased*.

1839.

Jan. 16th.

The deceased died on the 23rd of October, 1838; she left a will executed shortly before her death, which was signed by a mark without the name of

A testatrix
signed her will
with a mark,
her name not
appearing.

Held to be a sufficient signing under the stat. 1 Vict. c. 26, s. 9.

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HILARY TERM.
Jan. 16th.In the goods of
BRYCE,
deceased.

the deceased; the signature was attested by two witnesses, Dr. Thomas Elliotson, and the nurse, who attended the testatrix.

Gostling prayed probate.

SIR HERBERT JENNER.

Although the name of the testatrix does not appear upon the face of the instrument, the affidavit sufficiently accounts for the manner in which the will was signed; the statute does not say that the name of the testator shall appear at the foot of the will; the paper is identified as being the will of the deceased, and being signed in the presence of the witnesses present at the same time, who attested its execution, I am of opinion that the statute is sufficiently complied with.

In the goods of ANN RAWLINS, Widow, *deceased*.

1839.

Feb. 2nd.

The deceased signed her will, not in the presence of witnesses, and subsequently produced her will before two witnesses, and said to them "sign your names to this paper."

Held not to be an acknowledgment of

her signature under the 9th section of stat. 1 Vict. c. 26.

The deceased died on the 22nd October, 1838, leaving a will, signed by her at the end, and with the following attestation:—

"Signed and sealed in the presence of, this 24th day of September, 1839. } CHARLOTTE BROWNING.
THOMAS BROWN."

Upon an affidavit of Charlotte Browning, to the following effect: "that on the 24th of September,

the deceased came into the room wherein the deponent and her fellow witness to the said will (Thomas Brown) then were, and produced and shewed to them the said last will and testament, (which, about half an hour preceding, this deponent, on going into the deceased's parlour, had observed her writing), and the said deceased then said to this deponent and the said Thomas Brown, 'sign your names to this paper,' meaning the said will; that this deponent and the said Thomas Brown, then at the same time, and in the presence of the said deceased and of each other, signed their names accordingly to the said will; and the said deceased, immediately they had so signed it, took it up and left the room therewith, and this deponent on the following day saw the same on the dressing table in the said deceased's bed-room."

1839.

Feb. 2nd.

In the goods of
RAWLINS,
deceased.

Haggard prayed probate.

SIR HERBERT JENNER.

Can the signature to this will be said to have been "made or acknowledged by the testatrix in the presence of the witnesses," as required by the ninth section of the statute? From the affidavit, it appears that all that the deceased did was to request the witnesses to sign their names to the paper, without saying that it was a will, or that the signature was hers; I cannot hold this to be a sufficient compliance with the statute, and I must reject the motion.

In the goods of WILLIAM HENRY FOY, *deceased*.

1839.

HILARY TERM.
Feb. 12th.

Probate having been granted at the Cape of Good Hope of a will and an unattested codicil thereto made there in March 1838, by an officer in the East India Company's service; probate of both papers also allowed to pass here.

William Henry Foy, a Major in the East India Company's Bombay Artillery, died at the Cape of Good Hope, on the 30th of March, 1838. He quitted this country early in life, and in 1827, while on furlough in England, he married, and in 1829 returned to India, where he remained until January 1838, when he proceeded on leave to the Cape of Good Hope for the benefit of his health. Shortly before his death he made a will which was duly attested, and he afterwards made a codicil, which he signed, but which was not attested by witnesses. Probate of both papers was granted at the Cape of Good Hope.

Curteis moved the Court to grant probate of both papers, following the grant at the Cape.

SIR HERBERT JENNER.

Was the deceased domiciled there?

Curteis.—No; he was at the Cape only for temporary purposes. He intended to return to India, where, I submit, he was legally domiciled.

SIR HERBERT JENNER.

Does a person by going to India in the East India Company's service change his domicile?

Curteis.—I submit that he does, it was so held

in *Bruce v. Bruce* (a). But if not, here is the decree of a competent Court where the deceased died, and the statute 1 Vict. c. 26, does not extend to the Colonies. Mr. Justice *Blackstone* (b) says, that the Colonies are not bound by an act of Parliament unless particularly named; and that such was the opinion of the authorities in India, is shewn by their having (with certain exceptions) re-enacted the statute as to wills, but such Act was not come into operation until the 1st of February, 1839.

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HILARY TERM.
Feb. 12th.In the goods of
FOY,
deceased.

The Court directed the case to stand over, and on a subsequent day, allowed probate of both papers to pass, but gave no opinion as to the domicile. X-

(a) 8 Bro. P. C. 566; 2 Bos. & P. 299, note; and Lord *Eldon's* observations in *Marsh v. Hutchinson*, 2 B. & P. 231.

(b) Vol. 1, Introduction, § 4.

In the goods of JAMES CLARK, deceased.

1839.

Feb. 20th.

James Clark, late of Warfield, in the county of Berks, died on the 4th of June, 1838. Shortly before his death, and upon the day on which he died, being very ill, he requested the Rev. Mr. Furlong, the vicar of the parish, who was attending him at the time, to make his will. Mr. Furlong accordingly drew up a will, and the deceased took a pen in his hand for the purpose of signing his name to the will, but from bodily weakness was unable to do so; he then requested Mr. Furlong to sign the will for him; Mr. Furlong upon this, with the statute 1 Vict. c. 26, before him, and in-

Testator being too ill to sign his will, requested the drawer thereof to sign it for him, which he did in his own name, not in that of the testator: *Held* sufficient.

1839.

Feb. 20th.

In the goods of
CLARK;
deceased.

tending to follow its provisions, signed the will in his own name, thus,

“ Signed on behalf of the testator, in his presence, and by his direction, by me,

“ C. F. FURLONG,

“ Vicar of Warfield, Berks.”

The above signature was made for and acknowledged by the testator, in the presence of us, whose names are hereto subscribed,

“ MARY BUTLER ✕ her mark,

“ ANN CLARK.”

The witness, Ann Clark, was the wife of the deceased, and had a legacy under the will, and was appointed the executrix according to the tenor thereof.

Jenner prayed probate to the executrix.

The Act has been complied with, and the executrix is a good witness, although she will lose her legacy under the 15th section of the act.

SIR HERBERT JENNER.

The statute allows a will to be signed for the testator by another person, and it does not say that the signature must be in the testator's name; here, this gentleman, at the testator's request, signed the will for him, not in the testator's name, but using his own name. I incline to think that this is a sufficient compliance with the Act; the executrix is a good witness, but will lose her legacy.

Probate to pass.

In the goods of ANN ALLEN, Widow, *deceased*.

1839.

March 19th.

Ann Allen, the deceased, died on the 29th of January, 1839. On the 29th of December preceding, she executed her will, by making her mark thereto in the presence of William Tuck, who then, in her presence, subscribed his name as a witness. On the 7th of January, Amy Lake Overton having arrived at the deceased's house from Bristol, the deceased, in her presence, and in that of William Tuck, both of whom were present at the same time, acknowledged her said will and her aforesaid mark, and Amy Lake Overton then signed her name as a witness thereto in the presence of the deceased and of William Tuck, who did not again attest the will.

The deceased signed her will, by a mark, in the presence of one witness who subscribed the will as attesting it, and on a subsequent day she acknowledged her signature in the presence of that witness and of another who also subscribed the will, but the former witness did not again subscribe the will; probate refused.

Haggard prayed probate.

SIR HERBERT JENNER.

The Act requires that the signature "shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and that such witnesses shall attest and shall subscribe the will in the presence of the testator." Here, the deceased made her mark in the presence of one witness only, who attested it, and afterwards, on a subsequent day, acknowledged her signature in the presence of the same witness, who did not then subscribe it, and of another who did. The natural construction of the words of the act, which are in the future tense, seems to be that, when the

1839. signature is made or acknowledged, the witnesses
 March 19th. shall *then* attest it, not one at one time and one at
 In the goods of another.
 ALLEN,
 deceased.

Haggard.—The act does not expressly require that.

SIR HERBERT JENNER.

No, not expressly; but are the words, shall attest, equivalent to shall have attested? Suppose both the witnesses had subscribed the will singly at different times, and the deceased had afterwards acknowledged her signature, would that have been sufficient?

I doubt whether this is a sufficient compliance with the Act, and I must reject the motion. Had not the property been so small, (under 100*l.*), I should have directed the paper to be propounded.

In the goods of CHARLES NICHOLAS RIPPIN, Esq.

1839.

March 19th.

Testator duly executed his will with a legacy therein of *fifty* pounds to S.S., subsequently to the execution, the testator erased the word *fifty* and substituted the word *thirty*, this alteration being unattested, probate of the will passed in blank, the word *fifty* having been entirely erased.

The deceased died on the 9th of January, 1839, having made his last will and testament, bearing date the 19th of November, 1838, and thereof appointed James Dolman, Henry John Turner, and George Kirby, executors, and which was duly attested. In the early part of the month of December, 1838, the deceased gave his will to James Dolman, who was then upon a visit to the deceased, and requested him to peruse it, and give his opinion

and requested him to peruse it, and give his opinion

as to the contents thereof. James Dolman took the will away with him, and on the next day carefully perused the same, and particularly noticed that the deceased had therein left a legacy of fifty pounds to his servant Sarah Soar, and had only given a legacy of twenty-five pounds to each of his two sisters. Shortly afterwards, upon returning the will to the deceased, he asked Mr. Dolman whether it would do, who pointed out the legacy of fifty pounds to the servant, and said he considered it too much, with reference to the legacies of twenty-five pounds to his sisters; upon which the deceased asked him if he could not make a codicil, to which he replied in the affirmative. The testator shortly before his death delivered his said will to Mr. Dolman, folded up in an envelope, and it remained in his possession in the same state until after the deceased's death, upon which event he again opened and read the same, and then noticed that the word "fifty" in the legacy to the said Sarah Soar was erased, and the word "thirty" in the testator's handwriting substituted.

1839.

March 19th.

In the goods of
RIPPIN,
deceased.

Pratt prayed probate of the will as it originally stood.

SIR HERBERT JENNER.

The will is duly executed, but there appears in it a legacy of thirty pounds written on an erasure, and there is no signature of the testator or subscription of the witnesses, made in the manner required by the 21st section of the Act; the alteration, therefore, can have no effect, except so far as the effect of the will, as it originally stood, shall not be apparent. It is not apparent what the word was

1839.

March 19th.

In the goods of
RIPPIN,
deceased.

over which "thirty" is written, it cannot be made out. The legacy then of thirty pounds being an alteration, and not attested in the manner required by the statute, cannot stand; and the only question is, whether the legacy of "fifty" pounds, which is not apparent upon the face of the will, but which is deposed to by a party who saw it in the will before the alteration, can be pronounced for? I am of opinion that the Court is not at liberty to supply by parol testimony what is not apparent upon the face of the will itself, and the 21st section of the Act, declaring that, "no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent," &c. I am of opinion that, according to the construction which I must put upon these words, the legacy is lost altogether.

Probate to pass with the legacy in blank.

The fit however on the authority of Pease v Kent. admitted evidence abundantly proved probate with the word "fifty". 2 G.C.V. 1. p. 514 June 6. 1842

1839.

March 19th.

Testatrix signed her will, and on a subsequent day sent for two witnesses to attest the same, upon their arrival they said that they were come for the purpose of signing their names as witnesses to her will, which was then produced,

In the goods of MARY WARDEN, Spinster, deceased.

Mary Warden, of Great Ilford, in Essex, died on the 28th of December last. On the 10th of that month, the deceased being in a declining state of health, requested D. P. Gladwin to make her will, which he did, and after he had read the same over to the deceased, she signed it in the presence of Gladwin, Elizabeth Tuck, and Elizabeth Martin, but Elizabeth Tuck alone subscribed her name as a witness. A day or two afterwards, Gladwin and

upon which the testatrix said, "I am glad of it, thank God!" and they subscribed the will as witnesses: *Held*, to be an acknowledgment of her signature by the deceased, under 1 Vict. c. 26, s. 9.

Tuck being with the deceased, Gladwin suggested to her that he thought there should be two witnesses to her will, upon which the deceased immediately sent for William Habgood and James Carter (neighbours), for the purpose of their witnessing her said will. When Habgood and Carter came, they went up into the deceased's bed-room, when Gladwin produced the will, and told the deceased that they had come as she requested for the purpose of signing their names as witnesses thereto, to which the deceased replied, "I am very glad of it, thank God!" whereupon Habgood and Carter signed their names to the will in the presence of the deceased, both being present at the same time. Gladwin then sealed up the will in an envelope, and left it with the deceased.

Below the signature of the testatrix, these words were added, "I appoint D. P. Gladwin to execute this my will."

Addams submitted that this was a virtual acknowledgment of her signature by the deceased. The act does not expressly require a direct acknowledgment: suppose a person wrote his will on a sheet of paper and signed it, and sent for two witnesses, and said, there is my will, attest it, would not that be sufficient? Is not the present case in effect the same? He cited *Bythewood's Conveyancing, by Jarman*, vol. 1, p. 75; and the Court being of opinion that, under the circumstances, the signature was sufficiently acknowledged by the testatrix, under the ninth section of the statute 1 Vict. c. 26, allowed administration with the will annexed to pass to the residuary legatee, the appointment of the executor not being part of the will.

1839.

March 19th.

In the goods of
WARDEN,
deceased.

In the goods of SARAH BIGGAR, (Wife of CHARLES BIGGAR), *deceased*.

1839.

April 18th.

A married woman having under her marriage settlement a power to dispose of property "by will to be published by her in the presence of and to be attested by two credible witnesses," published her will in the presence of two witnesses, who attested the same, one of those witnesses being the wife of the executor, who was also a legatee under the will and had not renounced or released his legacy. Probate granted, leaving the question as to the due execution of the power, open.

The deceased, under her marriage settlement, had a power to dispose of certain property "by her last will and testament, in writing, to be published and declared in the presence of and to be attested by two or more credible witnesses." She made her will in due form, and it was attested by two witnesses, one of whom was the wife of J. E. Sanders, the executor, and a legatee of 10*l*. under the will, who had not renounced nor released his legacy. The parties, whose interests were affected, consented to the probate.

Addams prayed probate.

SIR HERBERT JENNER.

The will is required to be executed in the presence of two credible (that is competent) witnesses. One of the witnesses is the wife of the executor, who has not renounced, and who is besides a legatee. The consent of the parties will not render the witness competent. Formerly, in such cases, this Court left it to a Court of Equity to say whether the power was duly executed or not; but it has been held lately, that this Court is bound to give its opinion in the first instance as to the validity of the execution. It is really a question for a Court of Equity. The safest way will be to allow probate to pass, leaving the question as to the execution of the power open; it is clear that a Court of Equity cannot act unless the Court of Probate allows probate of the paper to pass.

In the goods of Sir CHARLES IBBETSON, *deceased*.

1839.

June 25th.

Sir Charles Ibbetson, late of Denton Park, in the county of York, Bart., died on the 9th of April, 1839, having executed his will, with a codicil thereto, on the 14th of November, 1838, and thereof appointed his sister-in-law, Dame Alicia Mary Ibbetson, widow, and John Thomas Selwyn, Esq. executors. The personal property of the deceased, amounted in value, to about 25,000*l*. When the will was prepared, blanks were left by the solicitor who prepared the same, for all the amounts of the legacies, and for the names of several of the legatees in the sixth sheet of the will; these blanks were afterwards filled up by the deceased previously to the execution of the will. After the death of the testator, upon opening the will, which was found with the codicil folded and sealed up together in an envelope, in a press or bureau in the deceased's sitting room, there was an obliteration of the name of a legatee, and the amount of the legacy, and an erasure of the amount of a legacy to his farming servants.

Testator after the execution of his will, obliterated and erased certain parts thereof. Probate granted of the will, with those parts in blank, the original words not being discernible on the face of the paper.

Addams moved for probate of the will as it then stood; that is, with the interlineations remaining, and with the parts removed in blank.

SIR HERBERT JENNER.

The obliterations and erasures should be carefully examined by persons accustomed to inspect writings in order to ascertain how the will originally stood;

1839.

June 25th.

In the goods of
IBBETSON,
deceased.

possibly with the use of glasses, that may be discovered; but I am quite unable to make it out. The interlineations are all deposed to, in the affidavit of the solicitor as having been there before the execution; probate may, therefore, pass with the interlineations as stated in the affidavit; probate should also pass with the obliterated and erased passages restored, if they can be made out, otherwise probate must pass with those parts in blank.

Probate eventually passed with the interlineations, but with the parts destroyed in blank, as it could not be discovered what those parts originally were.

1839.

July 4th.

Probate allowed of an unattested codicil made at sea by a purser of a man-of-war, as that of a seaman, under the exception contained in the 11th section of the stat. 1 Vict. c. 26.

In the goods of RICHARD HAYES, *deceased*.

Richard Hayes, Purser of H. M. S. Thunderer, died on the 27th of August, 1838. He left a will duly executed on the 26th of April, 1833. On the 18th of January, 1838, he wrote a codicil to his will and signed it; this codicil was not attested.

On the 28th of May, *Curteis* prayed probate of both papers, submitting that the codicil was valid, under the exception contained in the 11th section of the stat. 1 Vict. c. 26, as the will of a *seaman at sea*, that section enacting, "that any soldier, being in actual military service, or any mariner or seaman, being at sea, may dispose of his personal estate, as he might have done before the making of this act." But the Court having some doubt whether a purser was included in the term *seaman*, directed the case

to stand over, in order to ascertain whether any construction had been put upon the word "*seaman*" with regard to nuncupative wills excepted under the Statute of Frauds.

1839.

July 4th.

In the goods of
HAYES,
deceased.

On the 4th of July the motion was renewed, the case of the *Earl of Euston v. Lord Henry Seymour, by his guardian*, before Sir William Wynne, (21st July, 1802,) having been found, in which an allegation, propounding a nuncupative codicil made by Lord Hugh Seymour, the admiral of the station off Jamaica, was rejected, on the ground of its having been made at the admiral's house on shore, and, therefore not "*at sea*," as required by the statute; Sir William Wynne, however, intimating his opinion, that the admiral would be included in the words "*mariner or seaman*," in the 23rd section of the statute of frauds, 29 Ch. 2, c. 3.

SIR HERBERT JENNER.

Under the old law it is quite clear, that this codicil would be entitled to probate, as no formality was required for the disposal of personal estate. By the 11th section of the recent statute, the wills of soldiers in actual military service, and of mariners or seamen at sea, are excepted from the operation of the act, and supposing the deceased, in this case, to have been a "*mariner or seaman*" within the terms of the act, the codicil is entitled to probate; the question then is, whether the purser of a man-of-war, comes within the terms "*mariner or seaman*." The only case in which a similar question has been raised, that the Court is aware of, is that which has been cited, of *The Earl of Euston v. Lord Henry Seymour*, the question in that case

1839.

July 4th.

In the goods of
RICHARD
HAYES,
deceased.

was, as to the validity of a nuncupative codicil of Lord Hugh Seymour, under the 23rd section of the Statute of Frauds. Lord Hugh Seymour had made a codicil by nuncupation, while at the house appropriated to the admiral of the station at Jamaica. Sir *William Wynne* was of opinion that the allegation propounding the codicil was inadmissible, as it could not be said that the admiral was *at sea* at the time of nuncupation; but on reference to the notes of Sir Christopher Robinson and Dr. Arnold, I find that Sir *William Wynne* said that if it had been *res integra*, and he had been compelled to determine the question, it was "the inclination of his mind" to hold that the term "*mariner or seaman*," included the whole profession, "because he did not know where to stop." Some of the reasons assigned for the exception, (which was not merely to protect illiterate persons,) it was said, applied just as well to the commander in chief, as to a common seaman; the same sudden emergency might arise to render it necessary for the individual to dispose of his property by word of mouth, in the one case as in the other; and whilst at sea, one might be *inops consilii*, as well as the other. It is difficult to say where the line of exclusion is to be drawn. Under these circumstances, this being the only case which the Court has to guide it, in the construction of the act, and thinking that the reasons for the exemption apply equally to a commander-in-chief, as to a common seaman, I incline to hold that the codicil in question, falls within the exception contained in the 11th section of the act, as being that of a "*seaman at sea*." I am of opinion, according to the construction of the

term given by Sir *William Wynne*, and according to the reason of the thing that the term "*mariner or seaman*," does not exclude any person in her Majesty's navy, though superior officers of the ship, being "*at sea*," from the exception contained in the act.

1839.

July 4th.

In the goods of
HAYES,
deceased.

Probate to pass of the will and codicil.

In the goods of JOHN JOHNSON, *deceased*.

1839.

July 4th.

John Johnson, a Major in her Majesty's 13th Regiment of Foot, embarked from India for England, on the 18th of March last, and died on the voyage on the 19th of April. On the 20th of August, 1838, while in India, he executed a will which was attested by two witnesses, but it did not appear from the attestation clause, that the witnesses were present at the same time, and there was no affidavit to that effect. While on board ship he executed a codicil which was duly attested, in which reference was made to his will.

Probate allowed of a will executed in India, and attested by two witnesses, but without a full attestation clause; the Court presuming that the statute had been complied with.

Addams moved for probate of the will and codicil.

SIR HERBERT JENNER.

The will is dated the 20th of August, 1838, there are two witnesses to that will, but it does not appear upon the face of the paper that the requisites of the act have been complied with, and there is no affidavit to that effect; but where, as in this case

1839.

July 4th.

In the goods of
JOHNSON,
deceased.

the witnesses are in India, the Court will assume that the will has been duly executed. Here there is reference made to the will, in the codicil which was duly executed, which might be a republication of the will. Again, might not this gentleman be considered a "soldier in actual military service" under the 11th section of the act?

Addams.—I should submit that he might.

SIR HERBERT JENNER.

In this case I shall assume that the act has been complied with.

1839.

July 15th.

The appointment of the executors in a will, being made in a clause after the signature of the testator, administration, with the will annexed, granted to the residuary legatees, the clause appointing the executors not being part of the will.

In the goods of THOMAS HOWELL, *deceased*.

Thomas Howell, died on the 7th of April, 1839, leaving a will dated the 27th of March preceding, signed by him, and attested by three witnesses. The will concludes thus, "declaring this to be my last will and testament, on the day and year first before written.

"Signed, sealed, and declared by me,
the testator, THOMAS HOWELL,
in the presence of us,
at his request, and in the
presence of each other as witnesses.

The
Seal.

"CHRISTOPHER BROWN.

"JONAS HUNT.

"JASPER TAYLOR."

"And I hereby appoint Messrs. Bradford and Burt of Swinden, and Jonas Hunt, executors."

The whole of the will, including the appointment of the executors, was written before the deceased signed it, it was all read to him, and he afterwards signed it, and it was attested by the witnesses.

1839.
July 15th.
In the goods of
HOWELL,
deceased.

Phillimore prayed probate to the executors.

SIR HERBERT JENNER.

The appointment of the executors is after the name of the testator. If that is part of the will, the signature is not at the foot or end of the will, as required by the statute, the Court has no discretion, but must deal with this addition in the same manner, as if it had been a bequest of the residue or of real estate.

Motion rejected.

The Court subsequently allowed administration with the will annexed to pass to the residuary legatee, without the clause appointing the executors; upon their consent.

In the goods of WILLIAM BROOKE, *deceased*.

1839.

Dec. 4th.

The deceased left a will, dated the 15th of July, 1837. After the statute, 1 Vict. c. 26, came into operation, the testator made certain alterations in his will, by erasing some words, and inserting others, and at the end of the will, he wrote this memorandum; "The erasure in the twenty-third line of the sixth sheet, the word "two" taken out,

Testator, after the 1st January, 1838, erased certain words in a will executed in July, 1837, and wrote a memorandum, stating what the words erased originally were, but such memorandum was

unattested. Motion for probate of the will as it originally stood, rejected.

1839.
Dec. 4th.
In the goods of
BROOKE,
deceased.

and the word "one" put in its place; and in the first line of the seventh sheet, the word "four" taken out, and the word "two" put in its place, and in the fifth line of the seventh sheet, the word "four" taken out, and the word "two" put in its place:

"By me, WM. BROOKE, June 26th, 1838."

These were the alterations in question, and they were not attested as required by sect. 21 of the stat. 1 Vict. c. 26.

The Queen's Advocate prayed probate of the will as it originally stood, submitting that the Court might do so, as it appeared from this memorandum upon the will itself what the original words were.

SIR HERBERT JENNER.

If the construction which the Court has put upon the 21st section of the act be correct, (a) this motion must be rejected. My opinion is, that the memorandum being unattested, forms no part of the will of the deceased, and that it cannot be looked at to shew what the words were which have been erased. If any doubt exists as to propriety of the construction which the Court has put upon this clause of the Act, the will should be propounded; (b) in order that the opinion of the Superior Court may be taken upon the point.

Motion rejected.

(a) Rippin deceased, ante, 332, and Sir C. Ibbetson, deceased, 337.

(b) This was afterwards done, and the allegation propounding the will as it originally stood, was rejected, and from the decree of the Court rejecting the allegation, an appeal was prosecuted to the Privy Council where the point has been argued, but as yet no decision has been given.

The Jud Com held that evidence should be admitted to prove what the original words were & pronounced for the will as it previously stood.
8 June 1841 July 1 - 1841.

ARCHES COURT OF CANTERBURY.

ROOKES *against* ROOKES.

On Petition.

1840.

HILARY TERM.
Jan. 11th.

This was an appeal from the sentence of the Judge of the Consistorial Court at Exeter, in a cause of divorce, by reason of cruelty, brought by the wife against her husband. On the 12th of July, 1839, the Judge pronounced, that Mrs. Rookes had failed in proof of her libel, and dismissed Mr. Rookes; from that sentence an appeal was alleged *instanter*, and a minute of Court was entered to the following effect:—"On which day the Judge, &c. did pronounce, decree, and declare, that the said Mary Rookes is not entitled to the sentence for which she prays in this suit." "Saving the Judge's reverence, &c. *Gidley (a)* appealed, and is assigned to certify of the prosecution of his appeal by this day month, if a Court day, otherwise, on the next Court day following."

The next Court day was on the 13th of September, when the appeal not having been prosecuted, and

A party who appealed *apud acta*, being assigned to prove his libel of appeal in the Court above, referred for proof to the process, in which were the following minutes of the Court below:

1. "With due deference, &c., *Gidley (A)* appealed, and is assigned to certify of the prosecution of his appeal by, &c."
2. "Gidley is assigned to certify prosecution of appeal."

"Appeal deserted."

Held, that the appeal was sufficiently proved, and that the second

(a) The proctor of Mrs. Rookes.

minute (under the circumstances) was of no effect.

Semble, that where a party has duly appealed, the judge of the Court below cannot limit the time for the prosecution of the appeal.

1840.
HILARY TERM.
Jan. 11th.

ROOKES
against
ROOKES.

no reason assigned for its non-prosecution, the following minute was entered :—

“To certify prosecution of appeal, Gidley is assigned. Appeal deserted.”

On the 23rd of October, the proctor for Mrs. Rookes, extracted in this Court an inhibition and citation, which being served and returned, an appearance was given for the respondent, and a libel of appeal was prayed and brought in; this libel was admitted on the 12th of November, and the respondent gave a negative issue thereto; the appellant was assigned to prove; a monition for the process issued, the process was brought in and the proctor for the appellant alleged, that the appeal was contained in the process. The proctor for the respondent now prayed that his party might be dismissed, on the ground that the appellant had not proved his appeal.

Addams, for the respondent.

The question is simply, whether the libel of appeal in this Court is proved; that is a question of fact, and the only proof offered is the process of the Court below; all that is contained in the process with reference to the appeal, is in the minutes of the Court at Exeter, of the 12th of July, and 13th of September, whence it appears that there was an appeal, but it also appears that such appeal was deserted. It is said that on the 13th of September, the case was not called; but in the affidavit of the registrar, it is sworn that the proctor was in Court, and that the entry was made agreeably to the usual practice of the Court.

SIR HERBERT JENNER.

Is it not a wrong practice to dismiss an appeal without calling the cause? If so, ought it not to be corrected?

1840.

HILARY TERM.
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ROOKES
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Addams.—This Court cannot try the practice of the Court of Exeter, in this question—whether the appeal was deserted or not, is a question of law; the question here is a point of fact, whether the appeal is in the process. I submit that it is not, it only appears that there was an appeal, and that it was dismissed.

Haggard, contra.—There is no question that an appeal was duly entered, can then a registrar, by the mere stroke of his pen, deprive a party of a sacred right, of that which Lord Holt terms a “badge of freedom?” Can he oust the jurisdiction of this Court?

A year and a day are allowed a party, who has entered an appeal, to prosecute it.

SIR HERBERT JENNER.

Do you contend that in all cases, that time is allowed? that the Court has no power to compel the prosecution of an appeal?

Haggard.—I cannot find any case in which a party’s appeal has been put an end to within that time.

SIR HERBERT JENNER.

What do the books of practice say as to the right of the Judge *a quo*, to abridge the time?

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Harding.—(on the same side), Oughton says (in tit. 320) that the Judge *a quo* may abridge the time; but here the cause was never called, the minute, therefore, is a mere nullity.

SIR HERBERT JENNER.

This is an appeal from the Consistorial Court at Exeter, and in that Court it was a cause of separation from bed, board, and mutual cohabitation, by reason of cruelty, brought by Mrs. Rookes against her husband, and (looking at the process) it appears that on the 12th of July, 1839, that Court pronounced, that Mrs. Rookes was not entitled to the remedy she prayed, and dismissed the party cited. From this sentence, which was a definitive sentence, it is admitted that there was an appeal *apud acta*, that is, immediately upon the sentence being pronounced. The minute of the Court entered on that day, is to this effect: “*Gidley appealed, and is assigned to certify of the prosecution of his appeal by this day month, if a Court day, otherwise on the next Court day following.*” So that there was an appeal immediately asserted *apud acta*. But on the 13th of September, (I presume the next Court day), the following minute was made.

“*Gidley is assigned to prosecute his appeal.*
Appeal deserted.”

The proctor for Mrs. Rookes proceeded in the usual way, to bring the case to a hearing before this Court: he extracted an inhibition and citation, which being served and returned into Court, the usual steps were taken by the party cited to appear before this Court: a libel was prayed and was

brought in, alleging the proceedings that had taken place in the Court below, and the sentence of the Judge, and the appeal asserted from that sentence; and that libel was admitted in the Michaelmas Term of that year. On the libel being admitted, the party was assigned to prove; there was a monition for process, the process was brought in, and the proctor for the party appellant alleged that the appeal was contained in the process, and I find that it is contained in the process, for it is an appeal from the definitive sentence of the 12th of July, that was asserted by the proctor; and the question is, whether the minute of the 13th of September is to deprive the party of the appeal asserted *apud acta*?

Let us see what is alleged to support the petition in this case, in which the party complains that there is no appeal whatever, and the Court is asked to pronounce against the pretended appeal, that is, that the party has failed to prove her libel of appeal. It is alleged on behalf of the appellant, that the minute of the 13th of September is a mere nullity; that the case on that day was not called in Court; that the entry was made entirely without the knowledge of the appellant's proctor in the Court, who was not authorized by her to desert the appeal, and it is contended, that she is entitled to a year and a day to prosecute her appeal. On the other side it is denied that the minute was made without the knowledge of the proctor, who was present in Court, and knew that the entry would be made. But there is the affidavit of the proctor, that Mrs. Rookes did not know it; that the case was not called, and he denies that, according to the practice of the Court, the course taken was a proper one. There is an

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affidavit of Mr. Turner, the registrar of the Court, and he states that he believes the minute of the Court of the 13th of September was not made without the knowledge of the proctor of Mrs. Rookes, "for that he was present in Court,"—that may be, but if the case was not called on, he had no notice ;— "and well knew that agreeable to the ordinary practice of the said Court, such entry would be made, unless he the said John Gidley was prepared on that day to certify the prosecution of his appeal."

If such be the practice of the Court, it is high time it should be amended. It is not because a practice of that kind has prevailed, that an assignation so made behind the back of the party, (for if the case was not called, there was no notice to the proctor) should have effect. "*Appeal deserted*," was not pronounced by the Court ; if the case was not called, there was no opportunity afforded to the other party of alleging anything to the Court.

I am clearly of opinion that there has been no desertion of the appeal. It is true, that the Court below is not prohibited from proceeding to enforce its decree until served with an inhibition ; but that cannot in any way affect the Court of Appeal. For the Court below to say I will limit the time within which a party shall prosecute an appeal, is not within the power of that Court : The desertion of an appeal must be declared by the Court of Appeal. I must overrule this petition, and with costs. (a)

(a) In this case no further proceedings were taken.

CONSISTORY COURT OF LONDON.

WHITCOMB *against* WHITCOMB.

1840.

HILARY TERM.
Jan. 28th.

This was a suit for restitution of conjugal rights, by the husband against his wife; the husband's residence was within the diocese of London; and the wife, who was living in the diocese of Hereford, had been cited by letters of request; she had not appeared to that citation, and the proctor for the husband now prayed the Court to pronounce the wife in contempt, for the purpose of carrying on the proceedings against her, in *pœnam contumaciæ*; the circumstances are stated in the judgment of the Court.

A citation at the suit of the husband living in the diocese of London, taken out in that diocese, being served by letters of request, on the wife, in the diocese of Hereford where she was resident. The Court pronounced the wife in contempt, for the purpose of carrying on the proceedings.

The husband's domicile is *prima facie* that of the wife.

Phillimore, in support of the motion. The question is, whether a wife has any other domicile than that of her husband. In *Chichester v. Donegal* (a), Sir John Nicholl said, "*Prima facie*, at least, the husband's actual and the wife's legal domicile are one, wheresoever the wife may be personally resident." The judgment of Sir J. Nicholl in that case, (though not precisely in point) was confirmed by Sir John Leach. (b)

JUDGMENT.

DR. LUSHINGTON.

This is a very important question, and it is de-

(a) 1 Add 19.

(b) 6 Madd. 375.

1840.

HILARY TERM.

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against

WHITCOMB.

sirable that I should briefly state the facts upon which my judgment must be founded.

The facts of the case, (for I am bound to take the affidavits as true) are these: There has been a legal marriage between the parties, and whilst they were resident at Presteign, in the diocese of Hereford, the wife withdrew from her husband without just and legal cause; and, subsequently to that period, the husband quitted his residence at Presteign, and became permanently resident within the jurisdiction of the Consistorial Court of London. Then he instituted a suit for restitution of conjugal rights, and a citation by letters of request was taken out and duly served, but there was no appearance in obedience to the citation, and I am now prayed to pronounce the wife in contempt, for the purpose of proceeding in the cause. It has been truly said, that there is no direct authority upon this point; but that it has been held that the residence of the husband is the residence of the wife. I have looked at the case of *Donegal v. Donegal*, which I consider to be an authority in favour of the position. But there is another case, bearing more immediately upon the point, *Shackell v. Shackell*, in the Arches Court, in which the husband, who resided at Egham, cited the wife, who resided at Paris, and of course the jurisdiction of the Court could only be founded on the husband's being resident within the jurisdiction of the Arches Court at the time. But I think there is a case still more to the purpose, that of *Sir George and Lady Warrender (a)*, in the House of Lords; for though the report of the case

(a) 9 Bligh, 89.

refers solely to the Scotch law, yet the House of Lords laid it down in the strongest terms, that the wife, though not actually domiciled in Scotland, had her legal domicil there, to all intents and purposes, as it was the domicil of her husband ; that, therefore, the Scotch law governed the case, and they pronounced for a separation. Suppose a husband residing in England, and the wife, for the sake of their children, residing abroad, unless this Court could initiate proceedings for the purpose of his obtaining justice, the husband must resort to the foreign country, which might afford a different remedy from that which is obtained in this Court. I am disposed to grant the motion as prayed, and if the case comes to a final hearing, and the opinion of the Court shall be in favour of the husband, and there shall appear no cause for the separation, I shall have to determine whether or not I am to pronounce the wife in contempt for disobedience to the orders of the Court. *See Collett v Collett. 3 Val.*

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Jan. 28th.

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against
WHITCOMB.

SPRY *against* FLOOD.

1840.

This was a suit for perturbation of church-seat, by Dr. John Hume Spry, rector of Marylebone, against Mr. Christopher Flood, the vestry-clerk of the parish. On the First Session of Michaelmas Term, 8th November, 1839, the libel stood for admission ; it pleaded in substance,

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First, That the minister incumbent of every parish is entitled to convenient sittings in his

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parish church, for the use of his family, of common right; that such right is originally inherent in the minister incumbent of every parish, and that unless specially divested thereof, he ought to be protected in the enjoyment of the same, &c. (a)

Second. That the parish church of St. Marylebone was built and consecrated in February, 1817, by virtue of the stat. 51 Geo. 3, c. 151; that previous to the vestrymen proceeding (as, if they thought fit, they were authorized and empowered to do so by the said act), to let the pews in the said church to the inhabitant householders of the parish, and prior to the consecration of the church, two pews were (so far as they had authority to do so), by the said vestrymen, set apart or appropriated to the use of the minister of the parish and his family. That Dr. Heslop, the then perpetual curate, but afterwards rector, the said parish being made a rectory, in virtue of the stat. 1 and 2 Geo. 4, c. 21, on the consecration of the said church, took possession of the said two pews, and occupied the same by himself and family during the remainder of his incumbency, &c.

Third. The third pleaded the induction of Dr. Spry as rector, and his occupation of the pews so appropriated.

Fourth. That on the 15th of June last, Mr. Flood, the vestry-clerk, accompanied by a carpenter, though protested against by Dr. Spry, took forcible possession of the said two pews, by placing a padlock upon the door, and excluded Dr. Spry and his family therefrom, &c.

The *Fifth*, *Sixth*, and *Seventh* were the usual concluding Articles.

(a) This Article was rejected by the Court.

The *Queen's Advocate* and *Phillimore*. The libel begins, in the first Article, by pleading the right of the minister and incumbent at common law: "that the minister incumbent of every parish is entitled to convenient sittings in his parish church, for the use of his family, of common right; that such right is originally inherent in the minister incumbent of every parish, and that, unless specially divested thereof, he ought to be protected in the enjoyment of the same." We admit the general law, that, of common right, rectors are entitled to the principal pew in the chancel, and that if there is no chancel, the rector is of common right entitled to sufficient and reasonable accommodation for himself and his family. But the present case is taken out of the common law right, as is pleaded in the second Article; and the 51 Geo. 3, c. 151, gives to the vestrymen express authority to let *all* the pews in the church, with the exception of those for the poor.

Suppose all that is pleaded in the third and fourth Articles to be true,—if the vestrymen did set apart the two pews, could they bind their successors? Could not a subsequent vestry vary the arrangement, re-let the pews and make a different distribution of them for the relief of the church-rate, to which the rents of the pews are applied? Dr. Spry has not alleged that he has not sufficient accommodation for himself and family. The libel must be rejected altogether.

Addams and *Curteis*, in support of the libel. It is sufficient to aver that Dr. Spry has a possessory right to the pew, in order to put a disturber on his

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defence, and it is not necessary to plead an indefeasible right; and undisturbed possession for eleven years is amply sufficient to confer a possessory right. The law is not disputed, that the incumbent of a parish is entitled of common right to convenient sittings for himself and family; but it is said that this common right is taken away by the local act which authorizes the vestrymen to let the pews. But although there is not in terms an exception in favour of the minister, such a reservation must be understood; the common right of rector, vicar, or perpetual curate, who are all equally entitled to convenient sittings, cannot be ousted but by express enactment. Can it be maintained that the legislature intended to authorize the vestrymen to charge the incumbent of the parish for sittings for his family? The vestry acted originally as if they believed there had been a reservation, and the then incumbent took possession of the pews, not as if conceded by the vestrymen, but as of common right.

JUDGMENT.

DR. LUSHINGTON,

A possessory title to a pew is sufficient against a mere intruder.—
The Court will decide upon the admissibility of a plea, according only to the facts stated therein.

The sole question to be decided is, whether the libel, (taking the facts stated therein to be true) is or is not an admissible plea? There is nothing said as to whether the disturbance complained of was done by order of the vestry or not, and I do not mean to travel out of the libel, or to import any facts into the case beyond what are apparent on the face of the plea.

Before I speak more particularly of the contents of the first Article of the libel, I will state my

notions of the rights of a rector or vicar in an ancient parish church. I apprehend that the rector would be entitled, according to the common law of the land, to the chief seat in the chancel, whether he be endowed rector, or spiritual rector only, unless some other person were in a condition to prescribe for it for himself, from time immemorial; and that the Ecclesiastical Court, in the exercise of its ordinary authority, would allot to him the possession of such sitting, and protect him against the disturbance of such right. It is a question whether, under any circumstances, the rector or any one else, can properly be displaced from a pew, except by the Churchwardens, and how far Churchwardens could interfere of their own authority, with a possessory right, is a point upon which I do not mean to enter. It was the opinion of Lord Stowell that they could not do so without reference to the Ordinary. Perhaps later cases may have extended their power, and the necessity of the times may have allowed a different practice to grow up, and it may be competent to them to act without any authority of the Ordinary previously conferred.

Now, it is contended, on behalf of Dr. Spry, upon the facts stated in the libel, that he has a possessory title, and I certainly am of that opinion; but his right is pleaded in an inconvenient manner. I am not prepared (though it may not be necessary to dispose of that question) to assent to the statement of the law, as it is laid down in the first Article, and the Court should not admit this as an averment of law that can be substantiated. The term "minister incumbent," may be of a doubtful interpretation; if it be intended to include therein perpetual curates,

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The rector is
entitled to the
chief seat in
the chancel,
unless it be
prescribed for
by another.

Query, what
are the rights
of a perpetual
curate?

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I should have great difficulty in assenting to the proposition that the family of a perpetual curate have a common law right to sittings in the church. A perpetual curate, as in the case of the *Duke of Portland v. Bingham*, (a) may be a mere stipendiary curate, the impropriation being *in utroque jure*, for the monasteries had cure of souls, and performed the duties of the church by stipendiary curates, and since the suppression of the monasteries, the impropriator might have the complete incumbency. It was not till 1756, that Lord Hardwicke interfered to protect the rights of the curates; but these were not common law rights; so that if it be meant that a curate is to be protected in his title to sittings for his family by common law right, as existed from the time of Richard 1st, I confess I should have great difficulty in assenting to such a doctrine. [*Addams*.—The common law of the Church, not from time immemorial: it cannot be so, as the right to pews did not commence till the Reformation.] If it be the common law of the church, I have another view of the question. Supposing he had such a right, how could it be enforced? By the medium of the ordinary, who would allot a sitting. I will suppose a case of the alteration of a church, where the pew of the rector is taken down; he would appeal to the Ordinary, who would allot a pew; but I cannot say he has a common law right to any pew at all. I think, therefore, that the first Article had better be omitted, and it cannot be of much importance to the solution of the question.

Looking to the facts in the libel, I have no doubt whatever, that, if this was a case of possession in an

(a) 1 Hag. Cons. Rep. 157.

ancient parish church, Dr. Spry would have such a possessory right, as it would not be competent to a vestry clerk, or any individual, to molest or disturb. The question, therefore, is this; whether, from the peculiar circumstances of the parish, according to the statement made (so far as the Court can, on the face of the statement, form any opinion that will guide it), the ancient law is altered, and the vestry clerk is invested with competent authority so to interfere with the possessory right? Now, that a vestry clerk alone, should have such authority, would be an extraordinary anomaly. But it is not contended that the vestry clerk has any such right; I am told that he acted under the orders of the vestry; but that does not appear, and I am unwilling to say whether the vestry have such power or not: it will be time to give my opinion upon that point when I am called upon to decide it. But it is evident to me, and must be to any one, that hereafter I shall have to determine very different questions, and I apprehend it may be expedient that I should state my view of what these questions are.

First, To what extent the ordinary jurisdiction of this Court is ousted by private acts of parliament?

Secondly, Whether the vestry have a right to let *all* the pews, except such sittings as are to be appropriated to the poor?

Thirdly, If they have such right, whether they can displace with or without a cause, and whether I have or have not authority, as the act stands, to judge of their conduct and determination?

Lastly, as Dr. Addams has argued that Dr. Heslop

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was in possession of the pews, by what he denominates the common or ordinary right, whether, in point of fact, such a right exists or not?

As the case stands, I have no doubt that the libel is admissible, and I admit it, (except the first Article) with a slight alteration in the fourth Article.

I wish it to be distinctly understood that in the observations I have made as to the rights of perpetual curates, I have made them only *ex majori cautela*. I do not mean to give any opinion as to what those rights are.

To this libel Mr. Flood's answers were given, in which he admitted that he took possession of the pew, and dispossessed Dr. Spry; "but he said he so took possession of the said pew, for and on behalf of the vestrymen for the time being of the said parish, in his capacity of vestry clerk, by the order and directions, and under the authority of the said vestrymen; and that the said pew hath been since appropriated, and let by the said vestrymen to an inhabitant householder, &c."

An allegation was subsequently brought in on behalf of Mr. Flood, which stood for admission on the first session of Hilary Term, 1840; this allegation was opposed.—The contents of the allegation are sufficiently referred to in the judgment of the Court.

Addams, and *Curteis* for Dr. Spry. The answers of Mr. Flood to the libel, admit the whole case;

namely, that, previous to the consecration of the church, pews were set apart for Dr. Heslop, and which he occupied during his life ; that Dr. Spry is rector of the parish, and was in possession of those pews *quasi proprio jure*, and occupied them till he was disturbed by Mr. Flood, who contends that he was justified by the order of the vestry. The allegation sets up no legal justification of the disturbance. The right of Dr. Spry is admitted to be not only a possessory right, but an absolute right. The Act of Parliament gives the vestrymen no right of re-entry into a pew once let, except in certain specified cases. The object of the whole proceeding was to degrade and insult the clergy of the parish, and in particular to annoy Dr. Spry.

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The Queen's Advocate and *Phillimore*, in support of the allegation. Under the 51st & 52nd sections of the Act, 51 Geo. 3, c. 151, the vestrymen have the power to do what they may think "necessary, proper, and convenient," with any pews in the church, save in excepted cases. This parish is not under the general law, but under its own peculiar law. Dr. Spry has not ventured to say that the sittings he has left are not sufficient for himself and his family. The vestrymen had, under the act, a power to remove Dr. Spry from the pew, and let it to other persons, and even if, in doing so, there has been an absence of discretion, (which is not the case), it is not in the power of the Court to control them. We contend that the jurisdiction of this Court is ousted by the act.

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Held, that sect. 51 of the local statute, 51 G. 3, c. 151, which enacts, "that the said vestrymen (of St. Marylebone) shall set out and appropriate . . . such a number of seats for the gratuitous accommodation of the poor of the said parish for the time being, and also such of other pews or seats for the use of the parishioners of the said parish as the said vestrymen shall think necessary, proper, and convenient" is imperative upon the vestrymen, and empowers them to set out and appropriate the pews (other than those for the poor) without restriction, and not subject to the superintendence of the Ordinary.

JUDGMENT.

DR. LUSHINGTON,

This allegation purports to be an answer to the libel, which I was bound to consider an admissible libel. The opposition to its admission was analogous to a demurrer at common law: it was not disputed that I had some jurisdiction, and had power to interfere with a totally unauthorized disturber, and on the face of the libel nothing more appeared. This allegation sets up a different state of facts, and alleges that the law, as applicable to this state of facts, requires me to pronounce that the disturbance is justified, and that the dispossession was lawful. It does not question the jurisdiction of the Court, but contends, that, in the exercise of that jurisdiction, I am not to proceed as in a case where the ordinary ecclesiastical law would govern; but must follow the directions of a particular statute.

The question of jurisdiction, I apprehend, stands thus: this church is made a parish church, and is locally situated within the diocese. If no more had been said, the jurisdiction of this Court, and the ordinary ecclesiastical law would attach, and no saving of jurisdiction would have been necessary. But confessedly more has been done by the statute, and contrary to the common law, for the pews, under certain circumstances, are to be let by the vestry: unless sanctioned by Act of Parliament, letting of pews in a parish church is illegal. The result, then, is, that I retain the jurisdiction, but must administer the law as modified by the statute.

In considering the true construction of the statute, let us see what is the old general law on the subject of church seats. Dr. Spry, it is admitted,

had a possessory right to this pew. The vestry, as a vestry, could not have interfered, and their clerk would have been a disturber if he had attempted to do so, under the old law. Again, in a new church, where there can be no prescriptive title, the Court would allot to the rector a proper pew for himself and his family, and sittings for his servants. Then the question is, has this law been altered, and in what respects? In endeavouring to find the true exposition of the statute, it is vain to resort to authorities as to the mode of construction; many are to be found in the books, but, unless they are carefully discriminated, they would be more likely to lead into error than conduct to a safe conclusion.

The first consideration is, what is the meaning of the words in their plain and popular sense? The 51st section is in these words: "That the said vestrymen shall set out and appropriate, in the said new church or chapels to be erected, &c., such a number of seats for the gratuitous accommodation of the poor of the said parish, for the time being, and also such a number of other pews, or seats for the use of the parishioners of the said parish, as the said vestrymen shall think necessary, proper and convenient." Now this is a complete alteration of the common and ordinary ecclesiastical law; it dispossesses the churchwardens by necessary implication, of all the authority they would otherwise possess, since, according to the old law, this power was left, in the first instance, to the discretion of the churchwardens, and subject to the superintendence of this Court: that discretionary power is here taken away from them, and conferred upon the vestry.

The next question is, does the statute deprive

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the Court of its superintending authority, or does this Court possess the same power over the vestrymen, as it would have had over the churchwardens if no such statute had passed? Now, there is nothing of reservation or exception in the clause; the jurisdiction remains, it is true, but there is a wide distinction between the jurisdiction itself, and the law by which it is to be governed. How could I hold in this case, that I retain the ancient power of superintending the discretion exercised in the allotment of pews? According to the ancient law, this Court possesses such superintendence over churchwardens, but it has never superintended the discretion of vestrymen, because they have never had such power. How could I hold that the power which the common law gives me over churchwardens is given me by the statute, directly or indirectly, over vestrymen? It appears to me that I have no alternative, under this clause, but to say that this Court is deprived of the power which it exercises over churchwardens, and that, in their setting out of seats, there is no restriction imposed upon the vestrymen; it is to be done as they "shall think necessary, proper, and convenient." And this clause is imperative; the vestrymen are bound to set out seats for the gratuitous accommodation of the poor, and to appropriate other pews or seats; and if they neglect, they would be liable to indictment for violation of an Act of Parliament.

Held, that by the 52d section, which enacts, "that it shall and may be lawful to and for the said vestrymen, if they shall think

The next section enacts, "That it shall and may be lawful, to and for the said vestrymen, if they shall think proper, or any person appointed by them, to let the pews or seats to be erected, or placed within the said intended new church and

chapels, or any of them, (save and except the pews or seats to be appropriated for the gratuitous accommodation of the poor of the said parish for the time being as aforesaid) to such persons only who shall be inhabitant householders within the said parish." This is not an imperative clause; it gives the vestry a discretionary power to let the pews—what pews? "The pews or seats to be erected or placed within the intended new church, or any of them." If the statute had stopped here, I should have inclined to the opinion, that it would have given the vestrymen the power to let the whole of the pews. But then comes an exception: "save and except the pews or seats to be appropriated for the gratuitous accommodation of the poor." Where there are general words first, and an express exception afterwards, the ordinary principle of the law applies, "*expressio unius, exclusio alterius*." How am I to engraft another exception on the words? And can I say that the power conferred upon the vestry, is not a continuing power? That the vestry having once appropriated, cannot afterwards let? Upon what ground could I say, that, although the vestry have this power, in the instance of the rector, they are restrained from the use of it? In some cases it has been said, that you should so construe statutes, if possible, as not to affect common law rights; but this Act directly overturns all the common law upon the subject, for it at once subverts the authority of the churchwardens, the ancient officers of the church, and confers it upon the vestrymen, who by the old law had no authority at all.

Again; I cannot satisfy my mind that the rector

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proper . . . to let the pews, &c. or any of them (save and except the pews or seats to be appropriated for the gratuitous accommodation of the poor of the said parish for the time being as aforesaid) to such persons only who shall be inhabitant householders within the said parish," the vestrymen were empowered to let all the pews save those for the poor, and consequently to remove the rector from one of two pews of which he had been in possession from the time of his induction, and to let it to another inhabitant householder.

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has at common law a right to any particular pew in a new church; though unquestionably the Ordinary, if not restrained by statute, would give him proper sittings for himself and his servants.

The statute law of the land is binding upon every Court, and I think there is no worse justice administered than, even in the case of an admitted, and perhaps, unforeseen evil, to depart from the plain and simple words of a statute. I think all authority, as well as common sense, leads to the same principle of construction which is so well expressed by one of the greatest writers (a) upon political law, and which is as perfectly applicable to the construction of Acts of Parliament, as to the interpretation of treaties:—*verbis plenè expressis omnino standum est, nisi a rebus humanis omnem certitudinem removere volumus.*” Constrained, therefore, by the statute, I am under the necessity of admitting so much of the allegation as pleads that the vestry had the power of letting the pews not appropriated to the poor, and that, in pursuance of that power, they took possession of the pew in question, and let it; which disposes, so far as my judgment goes, of the main question in the case.

But various circumstances are pleaded to shew that the vestry have exercised a sound discretion in the course they have adopted; unless, however, I have power to decide what is a just and proper discretion, what can it avail to plead these circumstances? I have stated my reasons for thinking I have no such power; that the vestry are the sole judges, totally uncontrollable by any ecclesiastical authority. On that ground alone, therefore, I ought not to

(a) Wolff.

admit that which I believe to be wholly superfluous. But I think I am bound, where a statement of facts has been pleaded, in order to call upon the Court, to pronounce an opinion as to the discretion exercised by the vestry, to say that, assuming all the facts to be true, they do not satisfy my mind that a just and proper discretion has been exercised. Had the case hinged upon this point, I should have had no hesitation in saying, that all the circumstances together would not convince me that, for the sake of a paltry saving of a few pounds, it was wise, just, expedient, or proper, to deprive the rector of his pew, or to exact a rent for it. I should not have volunteered this opinion, if the allegation had been confined to the law of the case.

The result then is, that I shall admit the allegation when reformed, allowing the party to plead the law, and that Dr. Spry was dispossessed by order of the vestry ; and I reject the remainder of the allegation.

In Easter Term, the proctor for Dr. Spry declaring he proceeded no further, the proctor for Mr. Flood prayed that he might be dismissed with his costs.

The COURT was of opinion that it ought not to condemn Dr. Spry in the costs ; first, because it was a matter which affected not only himself but his successors ; secondly, because the question involved points of law of some difficulty : it was not, therefore, a case for costs.

1840.

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April 25th.

PREROGATIVE COURT OF CANTERBURY.

In the Goods of CONSTANTINE EDWARD PHIPPS.

Motion.

1840.

HILARY TERM.
March 17th.

—
An unattested will, made by an officer on service at Berbice, allowed to pass as that of a "soldier in actual military service," under 1 Vict. c. 26, s. 11, at the prayer of the party whose interest was prejudiced by such will.

The deceased was a lieutenant in the 76th regiment of foot, stationed at Demerara, where he died, 26th June, 1839, a bachelor, leaving a father. After his death, a testamentary writing, in the form of a letter to his solicitor, written by the deceased while on military service at Berbice, was found amongst his papers, dated January 28th, 1839, but unattested.

Haggard prayed probate of this paper, under the 11th section of the 1 Vict. c. 26, which exempts the wills of soldiers "in actual military service," from the operation of the act. The motion stood over for some time for inquiry as to what precise meaning was attached by the government authorities, to the phrase "actual military service."

It being stated at the War Office that the deceased would be there considered in actual military service,—the motion was renewed.

SIR HERBERT JENNER.

I understand there have been two cases (a) in which probate has passed in common form, upon

(a) Probate in the two cases referred to passed upon an affidavit from a clerk in the War Office, that the parties deceased were, at the time their wills were made, in actual military service.

affidavit that the deceased was a soldier in actual military service. I am not prepared to say that our regiments in the colonies, or in garrison at home, are in actual military service. I cannot think that it was the intention of the legislature to except every officer, under such circumstances, from the operation of the act. Under the peculiar circumstances of this case, considering that the party deceased was with his regiment, and in the opinion of the War Office, in actual military service at the time, I shall allow probate of this letter to pass. It is under the peculiar circumstances of this case that I do so, nor should I do it, but that the father, who prays probate, is the person who would be entitled to the whole property if his son is dead intestate, and there is no person against whom the paper could be propounded.

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PHIPPS.

In the Goods of JAMES BEAVAN, *deceased*.

Motion.

James Beavan, the younger, of the parish of Llanvihangel Crucorney, in Monmouthshire, died on the 16th of October, 1839. He made and duly executed his will on the 5th of that month, and appointed his brother, the Rev. Thomas Beavan, sole executor.

The will was prepared by Mr. Philip Price, of Abergavenny, solicitor, who was also one of the attesting witnesses. In the will, a legacy of *four*

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HILARY TERM.
March 17th.

A testator after the execution of his will, having partly erased the word *four*, and substituted the word *five*, the alteration not being attested, as required by the stat. 1 Vict. c. 26.—Pro-

bate of the will, passed as it originally stood, the word *four* being sufficiently apparent upon the paper.

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BEAVAN,
deceased.

hundred pounds was bequeathed to Anne Althea Beavan, the wife of the testator. This legacy of *four* hundred pounds, since the execution of the will, was increased to *five* hundred pounds, by partly erasing from the word *four* the letters *our*, and inserting in their place the letters *ive*, thereby converting the word *four* into *five*. This alteration was made within ten days after the execution of the will, by the Rev. Thomas Beavan, in the presence and at the request of the deceased.

Upon the face of the will it appeared that the letter *f* had not been altered, and other parts of the word *four* were also discernible.

Upon an affidavit from Mr. Price, the drawer of the will, as to the state of the will when executed, and from Mr. Beavan, as to the alteration being made subsequently to the execution of the will,

The *Queen's Advocate* moved the Court to allow probate of the will to pass as it originally stood.

SIR HERBERT JENNER.

There can be no doubt that the word *five* has been substituted for *four*, for it could have been no other word. That being so, and the letter *f* remaining unaltered, and part of the other letters of the word *four* also apparent upon the face of the instrument, are not "the words or effect of the will before the alteration" sufficiently apparent? The Court cannot pronounce for the word *five* as altered, as it has not been attested in the manner required by the 21st section of the act; but as it cannot be said that "the words or effect of the will before the alteration are not apparent." The

Court, I think, is justified in allowing probate to pass with the word *four*, as the will originally stood. This case is distinguished in this respect from those in which the probate has gone in blank, where it could not be made out what the original word or figure was. I think such a case can hardly occur again.

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BEAVAN,
deceased.

YOUNG *and* SMITH *against* RICHARDS.

This was a business of proving in solemn form the will of Jane Richards, spinster, who died in 1839, by James Young and William Smith, the executors named in a will of the deceased, dated 16th November, 1839, propounded by them, against James Richards, her brother, and only next of kin.

One of the two attesting witnesses to the will, in his deposition, had stated that, after the testatrix had signed the will, it was taken down stairs, and that the attesting witnesses signed their names thereto in a parlour, and not in the presence of the testatrix. Since he had deposed to this effect, he had recollected that he was in error, and that the attesting witnesses signed their names in the testatrix's presence, as the other witness had deposed. An application was now made to the Court to rescind the conclusion of the cause, for the purpose of re-examining the attesting witnesses.

1839.

HILARY TERM.
March 17th.

Of the two attesting witnesses to a will, one having deposed that the will was attested in the presence of the testatrix, and the other that it was not so attested.—The Court refused to rescind the conclusion of the cause for the purpose of re-examining the attesting witnesses.

The *Queen's Advocate*, in support of the application; *Phillimore*, *contra*, was stopped by the Court.

1840.

HILARY TERM.
March 17th.YOUNG
and
SMITH
against
RICHARDS.

SIR HERBERT JENNER.

The question is, whether this is an error, or an invention. Suppose the witness had stated that the deceased was not of capacity, and afterwards recollected that she was of capacity? It would be dangerous to allow the re-examination. I cannot, under all the circumstances, allow the conclusion of the cause to be rescinded, for the purpose of re-examining the attesting witnesses. I do not see how I could permit it after publication of the evidence, showing a defect of proof to satisfy the Act of Parliament. The affidavit I cannot believe. The effect of the deposition is to be considered when the case comes on for hearing. It may be a question whether hereafter the Court may not rescind the conclusion of the cause to admit the evidence of persons not yet examined. At present, I reject the motion.

April 23rd.

On the First Session of Easter Term. The *Queen's Advocate* applied for leave to examine further witnesses who were present at the transaction, on their affidavits, corroborating the statement of the attesting witness, who deposed to the attestation taking place in the presence of the testatrix.

Phillimore, contra.—This is a novel application, without sufficient ground, and it would form a dangerous precedent. Nothing can be more clear, and precise than the statement of the witness: “When this was done, Mr. Arthurton and I accompanied Mr. Young down stairs to the parlour, leaving the deceased in bed, and we there, in the parlour, in the presence of each other, and not in

the presence of the deceased, signed our names at foot of the said paper as witnesses."

1840.

HILARY TERM.
April 23rd.

YOUNG
and
SMITH
against
RICHARDS.

SIR HERBERT JENNER.

The question is not as to the deceased's capacity at the time of execution, nor is it pleaded that any imposition was practised towards her; both the attesting witnesses agree that she signed the will in their presence, but one says that they attested it in her presence, and the other that it was attested in another room. In such a case, what is the Court to do where the two attesting witnesses depose contrary to each other? There is no reason to suppose that each did not depose according to his and her belief at the time, and how is the Court to determine which it should credit? If there had been any plea by which the validity of the will, or the capacity of the deceased had been impeached, or any fraud had been suggested, the Court would have had greater difficulty in complying with this application; but would it not be too much for the Court to say, "I reject all supplementary evidence of persons who were present, because it is possible such persons may be prepared to support the case by perjury?" I do not think that the Court should place itself in such a situation. It is a different thing to re-examine an attesting witness, after the depositions have been seen; but the witnesses now to be examined are as able to speak to the transaction as the attesting witnesses themselves. What is the Court to do where witnesses differ? In another case, now before the Court, (a) a similar thing occurred; one witness swears the testator signed the will in the presence of

One of the attesting witnesses to a will, having deposed that the will was attested in the presence of the testatrix, and the other that it was not, the Court rescinded the conclusion of the cause, for the purpose of examining other witnesses who were present at the time.

(a) *Chambers and Yatman v. the Queen's Proctor*, see post.

1840.

HILARY TERM.
April 23rd.YOUNG
and
SMITH
against
RICHARDS.

the attesting witnesses, two others swear he did not. Is the Court to shut out all proof that will shew which is right? It is quite clear that the intention of the testatrix will be defeated, unless the Court can determine by other evidence, whether one witness is entitled to greater credit than the other. The Court will look with the greatest caution to evidence taken after publication, but if I were to reject this evidence, I should be certain of defeating the ends of justice. The Court will, therefore, rescind the conclusion of the cause to allow further witnesses to be examined who were present at the execution. I should have been disinclined to take this step but for the reasons I have assigned.

Application granted, reserving all other questions.

July 17th.

The wife of an executor who was a party in the cause is not a competent witness to support the will.

On a subsequent day, an objection was taken to the competency of a witness named Smith, on the ground that she was the wife of one of the executors, who was a party in the cause; and the Court held, that, notwithstanding the 17th section of the Act, an executor, *who was a party in the cause*, and consequently liable to costs, could not be examined as a witness in that cause, and, therefore, rejected the evidence of the wife.

The cause afterwards came on for hearing, and the Court pronounced for the will.

In the goods of E. J. LAY, *deceased*.

Motion.

The deceased in this case was mate of Her Majesty's ship *Calliope*, and whilst the vessel was in the harbour of Buenos Ayres, on the 4th November, 1839, obtained leave to go on shore, where he met with a severe fall, and was thereby so severely injured that he died on shore on the 9th. Immediately after the accident, he wrote on a watch-bill, in pencil, his will, which was cut out and certified by the officers on board the ship on the 5th; but it was unattested. The paper had been rejected by the receiver of seamens' wills, in regard to prize-money.

Addams moved for probate of the paper, under the 11th section of the act, excepting the wills of mariners "being at sea."

The COURT, distinguishing this case from that of *Lord Hugh Seymour* (a), who was living on shore at Jamaica, only occasionally going on board his ship, held that this case came within the exception of the act; that it was the will of a seaman at sea, although the deceased, having had leave to go on shore, was not actually on board ship at the time the will was made.

(a) *Vide* in the goods of *Richard Hayes*, deceased, *ante*, p. 333.

1840.

HILARY TERM.
April 23rd.

The will of a seaman, who went on shore, and there died by an accident, allowed to pass as that of a seaman "at sea," under the stat. 1 Vict. c. 26, s. 11.

COURT OF PECULIARS.

ELDRED *against* ELDRED.

1840.

EASTER TERM.
Second Session.
April 28th.

In a suit for divorce by reason of the wife's adultery, an allegation on her behalf, pleading cruelty by the husband, coupled with a charge of adultery, as a foundation for a prayer of separation against the husband, admitted.

This was a suit by Thomas Eldred, against Elizabeth, his wife, of the parish of Seven Oaks, Kent, for a separation, by reason of adultery. The libel pleaded the marriage of the parties in 1827; the birth of a child; and acts of adultery committed by the wife, in 1838, with a person in the service of Mr. Eldred, and in 1839, with two other persons. A responsive allegation on the part of the wife, denying the alleged adultery, and charging her husband with cruelty from the year 1831, and with adultery in 1834 and 1836, and concluding with a prayer for separation on both grounds, was now offered to the Court; this allegation was opposed.

Addams, for the husband. The objection to this allegation is, that it sets up the cruelty of the husband as a bar; whereas it is an acknowledged principle of these Courts, that cruelty cannot be pleaded in bar to a suit for adultery. This was attempted once a short time ago, in *Scriviner v. Scriviner*, in the Consistory Court of London, where the libel, charging the wife with adultery, was met by an allegation containing a charge of cruelty against the husband, which was objected to, and

the judge of that Court directed the whole of that part of the allegation to be expunged.

1840.

EASTER TERM.
Second Session.
Feb. 19th.

ELDRED
against
ELDRED.

Jenner, for the wife. The cruelty is not pleaded in bar to the suit for adultery; the wife not only pleads cruelty, but adultery; and it has been held that an act of cruelty will revive a charge of adultery that has been condoned. Here an act of adultery had been condoned, and the husband subsequently treated his wife with cruelty, which revived the adultery. *Durant v. Durant*. (a) In this allegation, the cruelty is pleaded as a revivor of the adultery.

Addams.—If this subterfuge avails, it may be adopted in every case, with a ruinous expense to the husband.

The Court desired the cases of *Chambers v. Chambers*, (b) *Chettle v. Chettle*, (c) and *Arkley v. Arkley*, (d) to be looked into; the whole question in the meantime standing over.

On the First Session of Easter Term, the case came on again for argument, when

April 15th.

Phillimore, for the husband, contended that the averment of adultery had been introduced merely as a peg upon which to hang a charge of cruelty, which was intended really as a bar to the husband's suit. The charges of adultery in the libel are confined to the years 1838 and 1839. The allegation

(a) 1 Hagg. E. R., 733.

(c) 3 Phill. 507.

(b) 1 Cons. Rep. 439.

(d) 3 Phill. 500.

1840.

EASTER TERM.
Second Session.
April 15th.

ELDRÉD
against
ELDRÉD.

deduces the cruelty from 1831; in November 1833, a separation took place; so here terminates the first period of the cruelty, as the wife returned to cohabitation in February 1834. Then is pleaded a charge of adulterous intercourse on the part of the husband with strange women, whereby he became infected with the venereal disease, with which she is alleged to have been also infected. But she is charged with forming low connexions. There is no case in which a wife, in her defence against a charge of adultery, has been allowed to introduce specifically a charge of cruelty as a bar. All the cases are different. *Worsley v. Worsley*, (a) *Chambers v. Chambers*, (b) *Arkley v. Arkley*, (c) *Chettle v. Chettle*, (d) *Durant v. Durant*, (e) *Popkin v. Popkin*. (f)

The COURT.—The plea is, that the wife had been treated with cruelty for a long series of years, and driven from the house; that the husband then committed adultery with strange women. I want to know whether, in such a case, cruelty, coupled with adultery, would not be admissible?

Phillimore.—I think not.

Addams, on the same side. This is an attempt to do, by a side-wind, what could not be done directly, namely, to set up cruelty as a bar to a suit for adultery, in the hope that, if the proof of the husband's adultery fails, the Court would ac-

(a) 1 Hagg. E. R. 734.

(b) 1 Cons. Rep. 439.

(c) 3 Phill. 500.

(d) 3 Phill. 507.

(e) 1 Hagg. E. R. 733.

(f) 1 Hagg. E. R. 765, n.

cede to the wife's prayer for divorce, on the ground of cruelty. At all events, it is an attempt to harrass the husband with expense, in the hope of deterring him from proceeding. It is the admitted doctrine of this Court, that cruelty is not pleadable in bar to a suit for adultery, substantially; if adultery be pleaded by the wife, and the husband sets up a condonation, the wife may plead cruelty to revive the adultery.

1840.

EASTER TERM.
Second Session.
April 15th.

ELDRED
against
ELDRED.

The *Queen's Advocate*, for the wife. The question is not, whether the charge of cruelty would operate as a bar to the husband's suit; but whether it is not pleadable, coupled with the adultery, not as a bar, but, if the wife establishes her innocence, as a ground for her prayer for a divorce. The wife's means of defence should not be marred: she avers her entire innocence, and the cruelty and adultery of her husband. It appears, from the original papers in *Arkley v. Arkley*, and *Chettle v. Chettle*, that acts of cruelty were allowed to be pleaded, and in the latter case there was no averment of the wife's innocence.

Jenner, on the same side. There has been a long chain of cases, from *Worsley v. Worsley*, (a) in 1730, in which cruelty has been allowed to be pleaded in defence, though not in bar.

JUDGMENT.

SIR HERBERT JENNER.

There can be no doubt that cruelty is not pleadable as a bar to adultery; but it is not clear that cruelty, coupled with other circumstances, may not

(a) 1 Hagg. E. R. 734.

1840.

EASTER TERM.
Second Session.
April 15th.

ELDRFD
against
ELDRFD.

be pleaded as a foundation for a sentence of separation. The charges contained in this allegation may be considered as made for a double purpose ; as a bar in the event of the wife's guilt being established, and as a ground for separation if it should appear that she is innocent.

In *Moorsom v. Moorsom*, (a) Lord Stowell says, "Indifference, ill behaviour, or cruelty, is not pleadable in a suit for adultery. It will not justify her criminal misconduct." But he does not say that it is not pleadable for other purposes. In *Forster v. Forster*, (b) the same learned judge says, "A third plea of defence offered, but with less effect, is, that his treatment of his wife, was as it really appears to have been, marked with unkindness and disaffection. I say with less effect, because if the course of unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this Court for the protection of a separation by reason of cruelty : and if the ill treatment is not of that gross kind against which the law would relieve in this form, still she is not to find her remedy in the contamination of her own mind and person, but in the purity of her own conduct, and in a dignified submission to an undeserved affliction. At the same time, though such a plea has no absolute effect, it has a very proper relative effect, where infidelity on the part of the husband, is likewise charged ; because it adds greatly to the probability that such a charge is well founded, if it appears that his affections were visibly estranged from his

(a) 3 Hagg. E. R. 37, 32.

(b) 1 Cons. Rep. 144, 146.

wife, and, therefore, more likely to be diverted to other less worthy objects;" in this case then, unkindness and disaffection towards the wife were pleaded by her as well as connivance; for these observations were made at the final hearing of the cause. In *Chambers v. Chambers*, (a) which was a suit against the wife for adultery, the wife gave in a long allegation, recriminating, asserting her own innocence, and pleading cruelty, incidentally, against her husband. Her plea did not conclude with any prayer; but at the hearing, a prayer was made on her part for separation, on the ground, it must be presumed, that her innocence and her husband's guilt were established. But although this charge was *incidentally* made, it formed part of the argument; for Lord Stowell, after having declared his opinion that Mr. Chambers had proved his case, and that Mrs. Chambers had failed in proving hers—that is, as to the charge of adultery against her husband—proceeds, "A remaining charge is that of cruelty, which is introduced rather incidentally, and was argued only on the supposition of the proofs of her innocence; but the Court holds her not innocent. On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty? I am inclined to think that she would not. It is certain that the wife has a right to say, 'You shall not have a sentence against me for adultery, if you are guilty of the same offence yourself.' The received doctrine of compensation

1840.

EASTER TERM.
Second Session.
April 16th.

ELDRED
against
ELDRED.

(a) 1 Cons. Rep. 439, 451.

1840.

EASTER TERM.
Second Session.
April 15th.

ELDRED
against
ELDRED.

would have that effect, because both parties are *in eodem delicto* ; but this is not so in recrimination of cruelty : the *delictum* is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know that she would be barred by a recrimination of that species ; for the consideration would be very different : the Court might not oblige her to cohabitation, which would be dangerous. Here the husband is the *prior petens* in a suit of adultery, and I take the general doctrine to be, ' that a wife cannot plead cruelty as a bar to divorce, for her violation of the marriage bed.' " That is no doubt the general rule, and founded upon reason and justice. The concluding passage is important as to the effect of the evidence in the cause. But the plea was not dismissed at once, as altogether irrelevant and unworthy of consideration, although it could have no effect as a bar to adultery which was fully proved. No one can hesitate to concur in the opinion thus expressed by Lord Stowell upon the proofs in that case ; but this decision could not apply, supposing the husband had not succeeded in establishing his wife's guilt, and the wife had been equally unsuccessful in her charge against her husband. In such a case, what would have been the sentence of the Court as to the remaining charge of cruelty ? Would the Court in such a case have dismissed the parties, and have left the wife, to have instituted another suit on the same facts ? Surely that would have been a most extraordinary way of proceeding, and extremely hard upon the husband in point of additional expense ; or, suppose another case, namely, that both parties had established their case against

the other, must the wife have been left to sue for restitution of conjugal rights when a return to cohabitation would be dangerous? Or must she be left without any provision or maintenance, the husband being equally guilty with herself? It is true that the husband may be put to great expense which may turn out to be unnecessary. The case may be altogether without foundation, may be fabricated merely for the purpose of harassing the husband, and deterring him from further prosecuting his suit, on account of the expense, which, as in this suit, he may be ill able to bear. Such a course would be deserving of the highest reprobation and censure; but can the Court, on that possibility, debar the wife from pursuing her legal remedy? Would not this Court run the risk of defeating the ends of justice if it were to shut out the wife's proof. These observations apply to cases generally of this description; in the present case there are circumstances which, perhaps, entitle it to a more favourable consideration. The parties married in 1827; they lived together without any imputation on the wife's purity, until 1838, when it should seem that she all at once plunged into the most profligate and barefaced adultery with a menial servant, scarcely taking the least precaution to conceal her guilt. This, which has been truly described in argument as a low and degrading connexion, was followed by scarcely less open adultery with two other persons in 1839. In August, 1839, the wife left her husband's house, voluntarily as he pleads, but as the wife alleges, in consequence of gross cruelty inflicted upon her by her husband. The husband was at this time

1840.

EASTER TERM.
Second Session.
April 16th.

ELDRED
against
ELDRED.

1840.

EASTER TERM.
Second Session.
April 15th.

—
ELDRED
against
ELDRED.

ignorant of any misconduct on her part; for he expressly pleads that he was only informed of it in September, when he lost no time in bringing this suit. Nothing is suggested in the libel of unhappiness or disagreements; it might be supposed that the parties lived together in a state of harmony and affection, until the unfortunate introduction of the groom into the service of Mr. Eldred.

But what is the fact, if the wife's statement be true? That the husband, from the year 1831, had treated his wife in the most cruel and brutal manner; that his treatment of her was such that she was obliged to quit him in the latter end of 1833, and that she only returned to cohabitation on promises of amendment on his part; but that his cruelty was again renewed, and continued up to the time of the final separation. There is the additional circumstance also pleaded, that in 1834 and 1836, he had contracted the venereal disease, which, in the former of those years, he communicated to his wife, and that in August, 1839, when his wife left him, the mother accused him of the fact, which he did not deny; so that he might not unreasonably expect that his wife might bring a suit against him. This rests at present merely in allegation; but supposing the facts pleaded by the wife to be true, surely the case assumes a very different complexion from that which it originally bore, and it can hardly be said that the cruelty here pleaded is merely a plea in bar. The facts and circumstances seem to be intimately connected with each other, and the history of the married life of these parties may throw some light upon the charges and the evidence by which they are to

be supported. In *Arkley v. Arkley*, (a) the cruelty was pleaded only as introductory of the charges of adultery. In *Chettle v. Chettle*, (b) a general charge of cruelty was pleaded, but the particular facts were struck out; on what grounds I have not been able to ascertain; but in that case there was no prayer for separation, but merely for dismissal; so that it should seem to have been pleaded as a bar to the sentence; in the present case, the cruelty and adultery are made the grounds for a prayer of separation on the part of the wife, which could only be obtained on the supposition of her innocence.

It may be argued hereafter that the husband's adultery has been condoned on the wife's own shewing; but it was held in *Durant v. Durant*, (c) that subsequent cruelty would revive condoned adultery; as it had been laid down in the earlier case of *Worsley v. Worsley*. (d)

It was formerly doubted whether it was not necessary to take out a cross citation; but in *Best v. Best*, (e) it was decided that such a proceeding was not necessary, as both parties were before the Court, and the marriage was the foundation for either suit; and in *Barrett v. Barrett*, (f) newly discovered adultery was allowed to be pleaded in a suit for cruelty without a fresh citation being taken out.

I am then of opinion that this allegation is admissible.

In Michaelmas Term, the cause came on for

Nov. 18th.

(a) 3 Phill. 500.

(b) 3 Phill. 507.

(c) 1 Hagg. E. R. 733.

(d) 1 Hagg. E. R. 734.

(e) 1 Add. 411.

(f) 1 Hagg. E. R. 22.

1840.

EASTER TERM.
Second Session.
April 15th.

ELDRFD
against
ELDRFD.

1840. hearing, when the wife abandoned her defence, and offered no opposition to the sentence of separation.

EASTER TERM.
Second Session.
Nov. 18th.

ELDRED
against
ELDRED.

Phillimore, for the husband, prayed the Court to condemn the wife, under the circumstances, in costs.

The Court, however, pronounced for the separation by reason of the wife's adultery, but made no order as to costs.

The cause had come on for hearing, the wife's costs and alimony having been first paid.

PREROGATIVE COURT OF CANTERBURY.

In the Goods of HUGH DONALDSON
DONALDSON, M.D.

Motion.

1840.

EASTER TERM.
May 1st.

The term
"soldier" in
sect. 11 of
1 Vict. c. 26,
held to extend
to persons in
the military
service of the
East India
Company.

The deceased, a surgeon in the East India Company's service, died at Calcutta in April, 1839, a bachelor, without a father, leaving his mother, and brothers and sisters. In July, 1838, he embarked from England (where he had been on leave since 1834), to join his regiment in India, and was placed in medical charge of recruits for Queen's regiments in that country, though he had no commission in

Her Majesty's service. Whilst on board ship, at Portsmouth, he wrote the paper in question, which he forwarded to his mother by post, and it remained in her custody till she heard of her son's death, which took place soon after he joined his regiment. The paper, which named no executor or residuary legatee, was not attested.

1840.

EASTER TERM.
May 1st.In the goods of
DONALDSON,
deceased.

Haggard moved for administration, with the paper annexed, to the mother, on the ground that the deceased was a "soldier in actual military service," which brought him within the exception of the 11th section of the stat. 1 Vict. c. 26.

SIR HERBERT JENNER.

The deceased must be considered to have been a surgeon in the East India Company's service; his being in charge of recruits for royal regiments, which was no part of his regimental duty, would not constitute him a Queen's officer. But with respect to mariners, the exemption is extended to merchant seamen, and by parity of reasoning, persons in the military service of the East India Company would seem to be included in the term "soldiers;" there is nothing in the section of the Act which restricts the exemption to the Queen's service. I am of opinion that a soldier in the East India Company's service comes within the exception; and I am inclined to hold that, under the circumstances, the deceased in this case was in actual military service at the time the will was written.

CONSISTORY COURT OF LONDON.

The Office of the Judge promoted by
HODGSON *against* DILLON.

1840.

EASTER TERM.
May 4th.

A license granted by the bishop to a clergyman to officiate in a proprietary chapel is revocable at the will of the bishop.

This was a cause promoted by the secretary of the Lord Bishop of London, against the Reverend Robert Crawford Dillon, D.D., a clergyman of the Church of England, for publicly reading prayers, preaching, administering the Holy Sacrament of the Lord's Supper, and performing ecclesiastical duties and divine offices, according to the rites and ceremonies, of the United Church of England and Ireland, in an unconsecrated chapel, called Charlotte Street Chapel, Pimlico, without any license or lawful authority for so doing, and contrary to, and in defiance of the injunctions of the Bishop of London to the contrary.

The Articles, which now stood for admission, alleged, that on the 29th February, 1840, the bishop, under his hand and episcopal seal, duly revoked a license granted by him to the defendant on the 24th July, 1829, to perform the office of minister of the chapel aforesaid, and strictly enjoined him thenceforth to abstain from further performing the office; that, notwithstanding, Dr. Dillon continued to officiate after the instrument of revocation had been served upon him, and since being served with the citation in this cause, with-

out license or lawful authority, and contrary to the bishop's injunctions.

The license, addressed to the Reverend Robert Crawford Dillon, M.A., authorized him to perform the office of minister of Charlotte Street Chapel, Pimlico, (the consent of the rector having been obtained) "in preaching the word of God, and in reading the common prayers, and performing all other ecclesiastical duties belonging to the said office, according to the form prescribed in the book of Common Prayer," he having first "subscribed the Articles and taken the oath, and made and subscribed the Declaration, which in this case are required by law to be taken, made and subscribed."

1840.

EASTER TERM.
May 4th.

HODGSON
against
DILLON.

Addams, for Dr. Dillon, opposed the admission of the Articles. Dr. Dillon, who is the proprietor of the chapel, became the purchaser, under the belief that, having obtained the consent of the incumbent of the parish, he could have a license, authorizing him to officiate as minister. Such license he obtained in 1829, from the present Bishop of London, and he had officiated ever since. The license did not run in the usual form to curates, *durante bene placito* ; it granted an absolute right of officiating without reservation. Is such a license, so granted to the minister of such a chapel, he being the proprietor, revocable at the bishop's mere pleasure, without due process of law? I submit that it is not, without such cause shewn as could deprive a rector, vicar, or perpetual curate. Stipendiary curates, whose license is revocable at pleasure, have an appeal under the statute. A person who has purchased a proprietary chapel, and has been

1840.

EASTER TERM.
May 4th.

HODGSON
against
DILLON.

licensed to officiate there, ought in fairness and equity to have some reason assigned, whereas nothing more is said than "We now revoke and declare void, &c." The bishop may have, or think he has, cause for the revocation, but none is set forth in the Articles. If there be any offence imputed to Dr. Dillon, the offence should be charged. By revoking the license without cause shewn, the bishop not only issues a sentence of deprivation at his own discretion, but of degradation, for no incumbent in this or any other diocese would allow him to officiate.

Nicholl, in support of the Articles. There is a distinction between the present case and the case of a rector, vicar, or perpetual curate; in the latter, the bishop must admit, unless he can shew cause; whereas, in such a case as this, he may refuse a license altogether; and if granted, he may revoke it at pleasure. I am not aware of any case or authority where it is doubted that the bishop has the power to revoke such a license as this.

JUDGMENT.

DR. LUSHINGTON.

It does not appear, from the Articles, that the bishop had any particular reason for revoking the license in this case; they are silent as to the motives which induced the bishop to adopt this measure; all that is presented to the Court, is an act done by him purporting to revoke the license he had granted. The question, therefore, is, whether the bishop has an absolute right, at his own exclusive discretion, to revoke such a license. Under such circumstances

I am not to impute to Dr. Dillon, the having given good cause for the act, nor to the bishop the having acted without any reason.

On looking at the terms of the license, I cannot but regret that licenses of this description should be worded with so little care and caution ; not that the mode in which the license is worded can affect the law of the case ; but on account of the doubts that may be raised, and of their leading people into mistakes. The license is granted to Dr. Dillon, as the minister of a proprietary chapel, and it authorizes him to perform all the “ ecclesiastical duties belonging to that office.” I know not what functions, according to the law of the Church of England, appertain to the minister of an unconsecrated chapel ; I know of no ecclesiastical duties belonging to that office. “ You having first before us subscribed the Articles, and taken the Oath, and made and subscribed the Declaration, which in this case are required by law to be taken, made, and subscribed.” I am not aware what that oath and that declaration are, which are said to be required by law. The observation is perfectly true, that this is an absolute license ; there is no reservation, that it should be only *durante bene placito*, or during good behaviour ; but it is simply a grant of a license ; and the question I have to determine is, whether the bishop has a right of summary revocation.

Neither of the counsel has referred to any legal authorities, and I do not think it requisite to support the judgment I am about to give by a reference to authorities on the subject. I think that the principle on which the law of the Church

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of England stands in this matter, is this:—no clergyman whatever of the Church of England has any right to officiate in any diocese, in any way whatever, as a clergyman of the Church of England, unless he has a lawful authority so to do, and he can only have that authority when he receives it at the hands of the bishop, which may be conferred in various ways; as by institution (in the case of a benefice), by license, where the party is a perpetual curate; and by license, when the clergyman officiates as stipendiary curate.

I do not think it requisite to consider what is done in the case of rectors, vicars and perpetual curates, because these persons are now all regulated by the law of the land. The point I have to consider is this: What is the nature of a proprietary chapel, unconsecrated, and what is the nature of a license granted by the bishop to the minister of such a chapel; by what power and authority he grants such license, and whether, on the ground of having granted such license, he is estopped from remedy himself, except in the mode required by law?

I need not state that the ancient canon law of this country knew nothing of proprietary chapels, or unconsecrated chapels at all. The necessity of the times, the increase of population, and want of accommodation in the churches and chapels in the metropolis and other large towns, gave rise to the creation of chapels of this kind, and to the licensing of ministers of the Church of England to perform duty therein. The license granted by the bishop on such occasions emanates from his episcopal authority. He could not, however, grant such a

license without the consent of the rector or vicar of the parish, for the cure of souls belongs exclusively to the rector or vicar. Here is the consent of the rector obtained not to an ordinary license to a stipendiary curate, but to confer a nondescript title, that of minister of an unconsecrated chapel.

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The bishop, therefore, confers this license by virtue of his episcopal authority. What is to prevent his revocation of it at any time he may think fit? Is this a license which will not only be good against him, but is it to prevail against any successor who may come after him? It is a license granted only from the exigency of the moment, and for no other reason whatever. Supposing, by new powers being given under the Church Building Acts, other churches and chapels were to be consecrated according to the law of the church of England throughout the land; would not the necessity for these unconsecrated chapels cease? And, under such circumstances, could the grantee of such a license continue to officiate, in direct opposition to the bishop?

It is not necessary to examine the expediency of vesting such a power in the bishop; the question is, what is the law? I think it is incumbent upon those who assert the affirmative; that is, who assert that it is in the power of the bishop to confer a permanent right, as against himself, to show that such a power has been conferred by the ecclesiastical law. I am of opinion that no such power has been granted; that it is not even in the power of the bishop himself to estop himself; but that he is bound, according to the exigency of the case, to

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revoke such a license, if he thinks the good of the Church requires it.

I have heard no authorities cited on one side or the other, which require the examination of the Court to ascertain their applicability; and on general principles, I am of opinion that the bishop has authority to revoke such a license as this according to his own discretion; he has exercised that discretion in this case—a discretion not examinable by me; and I have no alternative but to admit the Articles.

May 7th.

The defendant, at first, gave a negative issue to the Articles, but on the next Court day, retracted his negative issue, and gave an affirmative issue.

The *Court*, thereupon, pronounced in the terms of the promoter's prayer, namely, "That the defendant be monished to refrain from publicly reading prayers, preaching, administering the Holy Sacrament of the Lord's Supper, and performing any other ecclesiastical duties, and divine offices in the said chapel, without lawful authority, and that he be condemned in the costs."

In the goods of ALEXANDER ELLIS, Esq.

Motion.

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May 9th.

The deceased, a barrister at law, who died on the 21st of April, 1840, a bachelor, possessed of personal property to the amount of 18,000*l.*, shortly before his death, gave instructions for a will, which were taken down in writing from his dictation, by his uncle, whereby he bequeathed a legacy of 1000*l.* to each of his three sisters, and the residue to his brother. The deceased having remarked that there must be two attesting witnesses to the will, his uncle waited till the physician came, when the deceased signed the paper in the presence of the witnesses, who, unfortunately, previous to affixing their names to it, took the paper into another room, separated from the deceased's bed-room, by a passage, both doors being open, so that the witnesses could hear the deceased breathe, but could not see him, nor be seen by him.

Motion for probate, of a will signed by the deceased in the presence of two witnesses present at the same time, who went into an adjoining room and signed their names, rejected.

The Court said, that it was a very hard case, but the Court had no discretion under the Act, which is imperative, and no consents would do. If the execution is not attested in the deceased's presence, actual or constructive, the Court must refuse probate. In this case, the witnesses admit that they attested the paper in a room where they could not have been seen by the deceased, and could not see him.

Motion rejected.

ARCHES COURT OF CANTERBURY.

The office of the Judge promoted by Cory and
others v. BYRON.

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Articles against
a churchwar-
den for "quar-
relling, chi-
ding, and
brawling by
words," and
for "smiting"
pronounced
not to be
proved; but
no order made
as to costs.

This was a cause of office, brought by Letters of Request, from the commissary of the Bishop of Winchester, for the parts of Surrey, promoted by William Cory, John Charles Stahlschmidt, and Frederick Thomas West, inhabitants of the district of St. John the Evangelist, Waterloo Road, Lambeth, against John Ballard Byron, one of the churchwardens, for the offence of quarrelling, chiding, and brawling by words; and for smiting or laying violent hands upon John Larkin Hopkins, in the aforesaid district church, on Sunday, the 7th of July, 1839.

The Articles, after pleading the law, objected to the defendant that, on the morning of the day before mentioned, whilst the congregation were assembling for divine service, he entered the organ-loft, and addressing John Larkin Hopkins, who was therein, asked him, in an angry and imperious manner, who he was, and that Hopkins having replied that he attended to officiate for Mr. Brownsmith, the organist, he (the defendant), in an austere, quarrelsome, and chiding manner, replied that, "he knew nothing of him, or of any deputy of Mr. Brownsmith;" that the organ having been unlocked, Hopkins proceeded to seat himself in front of it, to commence the usual morning service,

whereupon the defendant, without any observation or previous notice whatever, struck Hopkins, and shouldered him from the seat with so much violence, that William Perkins, who was present, and against whom Hopkins was thrown, was thereby impelled with considerable force against one of the doors of the organ, causing considerable noise ; that some person present having uttered the word "assault," the defendant, in an angry, brawling, chiding, and quarrelsome tone of voice and manner, exclaimed, "Yes, I have committed an assault, and you are witnesses (or a witness) of it, and you may bring an action if you like as soon as you please ;" and that during the transaction, he conducted himself in other respects in a violent, quarrelsome, chiding, and brawling manner towards Hopkins, to the great offence of the persons there assembled, in violation of the statute, &c.

The responsive allegation pleaded that, in April 1839, John Leman Brownsmith was elected organist of the district church, he, at the time of his election, holding an appointment in the choir of Westminster Abbey, which prevented him from officiating at the organ on half the Sundays in the year, during at least the greater part of the morning service ; that the defendant, as one of the churchwardens, had been specially enjoined by the Rev. Robert Irvine, the minister, not to permit any chance assistant, whom Brownsmith might depute, to play the organ, when he did not attend, but to procure on such occasions a sufficient organist ; whereupon he (the defendant) did procure the attendance of Joseph Calkin, a former organist of the church, and who had become familiar with the notes and

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compass of the organ, and used to the style of singing in which the charity children had been taught, and who had officiated in the absence of Brownsmith, from the time of his election, till the 7th of July ; that, on that day, about twenty minutes before the commencement of morning service, the defendant seeing some one go into the organ-loft, followed him there, and when Hopkins announced himself as Brownsmith's deputy, he (the defendant) civilly told him that he could neither recognize him in that capacity, nor permit him to act ; upon which Hopkins, without demur, quietly left the organ-loft and quitted the church ; that about ten minutes before the service commenced, he (the defendant) upon re-entering the organ-loft (which he had left), to unlock the organ-doors with Calkin, found Hopkins again there, and upon his again announcing himself as Brownsmith's deputy, repeated what he had before said, and proceeded to unlock the organ, requesting Calkin to take the organ for the day ; that, having unlocked the organ, his right arm, extended for the purpose of pushing the right-hand folding-door back against the organ, came in contact with Hopkins, but without any considerable force, or any violence, save as resulted from the push made by Hopkins for the seat in front of the organ ; that no sooner had the defendant's arm come in contact with Hopkins, than one of the persons who had entered the loft with him, exclaimed, "an assault! you see an assault!" in answer whereto, the defendant merely said, in a mild tone of voice, without any excitement, "Then, Sir, if you think fit, bring your action for it; I have my witnesses;" and it denied that the defendant

conducted himself towards Hopkins in a violent, quarrelsome, chiding, and brawling manner.

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Phillimore and Curteis, for the promoters. It is proved that Hopkins was pushed with violence ; and words of brawling are proved. The churchwarden had no right, as churchwarden, to interfere with the organist's choice of a deputy. He took the key of the organ, which he had no right to do. The organist has the controul of the organ, and has a right to appoint a deputy. It is proved that Byron shouldered Hopkins off the stool with violence, and when told that he had committed an assault, said, in an angry tone, " Bring your action." The interrogatory to Hopkins, " Who are you ?" uttered in an angry and dictatorial manner, and the words " I don't know any one as Mr. Brownsmith's deputy," in a church, amount to brawling, which no provocation can justify. *Huet v. Dash*, (a) *Dawe v. Williams*, (b) *North v. Dixon*, (c) *Jarman v. Bagster*. (d)

Addams and Robinson, for the defendant. There is no proof of the Articles, even on the evidence of Perkins, Cooke, and Hopkins. The institution of the suit is an abuse of the process of the Court, and if the Articles had been submitted to the Judge, and he had been told the real story, he would not have permitted his office to be promoted. It is the duty of the Court to set its face against such suits if they

(a) 2 Sir George Lee's Rep. 511.

(b) 2 Add. 130

(c) 1 Hagg. E. R. 730.

(d) 3 Hagg. E. R. 356. 360.

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are instituted not for legitimate purposes, but for the gratification of private malice, or for any cause but the only justifiable one, namely, the vindication of public decency and propriety.

JUDGMENT.**SIR HERBERT JENNER.**

The offence imputed to the defendant is of a very grave and serious nature, not only quarrelling, chiding, and brawling by words, but smiting, or laying violent hands upon, a person in this district church, on a Sunday, immediately before the commencement of divine service, when the congregation were assembling for the performance of public worship. The jurisdiction exercised by these Courts, in cases of this kind, is a very wholesome jurisdiction, to prevent any unseemly quarrels in churches, especially during divine service; to preserve order and decorum in places set apart for the worship of God, and to protect congregations assembled for divine worship from having their minds disturbed by quarrels and brawls, and especially by the laying of violent hands upon any one in the church. The jurisdiction is not only a very wholesome one, but it is of ancient standing, for it was the law long before the 5 & 6 Edw. 6, (under which this proceeding is instituted, as well as under the ancient law), which was passed for the purpose of aiding, not creating, the jurisdiction of the Ecclesiastical Court. These offences were held to be of a very serious character as well before as after the passing of that statute, and whatever opinion some persons at the present day may entertain, as to a part of the punishment inflicted for such offences, namely, the

prohibition to enter the church for a certain period, at that time it was considered a very serious punishment, and the penalty of excommunication, *ipso facto* is incurred by a person who should smite, strike, or lay violent hands upon another, in the church or church-yard. It is true, at this time, the penalties attached to excommunication are not so serious as at the period when the Act of King Edward passed; for, by the 53 Geo. 3, c. 127, the sentence of excommunication is followed up by imprisonment for a term not exceeding six months. The offence imputed to Mr. Byron is the more serious, considering that he was one of the churchwardens of the parish, whose especial duty it was to preserve order in the church, and if the Court should be of opinion that he is guilty of the offence charged against him, he is doubly reprehensible, as he will not only have committed an ecclesiastical offence himself, but have violated his duty as an officer of the church, who is bound to keep due order and decorum in the church itself. Now, if the proof is made out, and the facts are established as charged in the Articles, there can be no doubt that this was as unprovoked an assault as can well be imagined, and the Court would have no hesitation in holding that Mr. Byron has incurred the penalty of the law. But the more serious the offence, the more important is it to consider whether the evidence be sufficient to establish it, and Mr. Byron, being one of the churchwardens, would be, as I said, doubly reprehensible, if guilty of the offence; yet, having, as churchwarden, duties to perform, the Court would protect Mr. Byron, if, in conformity with his duty, he did no more than

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was necessary to secure the due performance of divine worship, and to prevent any inconvenience arising to the minister, or the congregation assembled to hear divine service in the church.

Without at present entering into the defence set up by Mr. Byron, let us see what is the evidence in support of the Articles. The transaction appears to have arisen out of a dispute respecting the election of an organist for the parish. A Mr. Brownsmith had been elected, and had officiated as organist for seven years, down to Easter, 1838. In the latter part of 1837, or the beginning of 1838, he was appointed vicar choral in Westminster Abbey, and he was thereby prevented from attending at the early part of the service of the church of St. John's, Waterloo Road, every alternate Sunday, in every alternate month. It seems that, in Easter, 1838, a gentleman named Calkin, was elected organist in the parish, and he performed the duty in the years 1838-1839. He seems to have discharged the duty (according to this evidence) with great efficiency, attending much to the singing of the charity children and becoming well acquainted with the tones of the organ. But in Easter, 1839, Mr. Brownsmith was again elected organist, on which occasion a considerable degree of feeling appears to have been excited. Some members of the select vestry (who have the management of the affairs of the parish), objected to the appointment, because Mr. Brownsmith could not perform the duty personally, and it appears from the evidence of the Rev. Mr. Irvine, the minister, who has been examined on behalf of Mr. Byron, that there was an order of the vestry that the duty of organist should be performed per-

sonally, and not by deputy, and it does not appear from any part of the evidence, that this order of the vestry was ever rescinded: therefore, the order was still in existence. But this is a point of no great importance in the case. Mr. Calkin appears to have performed the duty of organist, in the absence of Mr. Brownsmith, for one or two Sundays preceding the 7th of July, 1839, and on that day he was called upon by Mr. Byron to officiate, as Mr. Brownsmith was not present. This is the historical part of the case, as leading to the transaction on which the present proceeding is founded.

The promoters of the suit are three gentlemen, named Cory, Stahlschmidt, and West, and the first circumstance which struck the Court, when Mr. Byron's Allegation was brought in was, that three gentlemen should have thought it necessary to take upon themselves the office of promoter, and the Court observed at the time that it was very unusual, and might possibly lead to the institution of suits without sufficient ground, since, if the promoters failed in substantiating their case, the costs would fall lighter upon two or three than upon one; and I am confirmed in my impression, that this unusual mode of proceeding ought not to be encouraged, for I find from the evidence of the promoters themselves, that a subscription was entered into, not indeed for the promotion of this suit, but for the institution of proceedings, somewhere against Mr. Byron for the assault upon Mr. Hopkins, in order that the expense might not fall upon one individual, but be shared by a great number. I am of opinion that this is not a proper practice, and I am not disposed to encourage the promotion of the office of

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The office of the Judge ought not to be promoted by more than one person, except in the case of churchwardens.

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the judge by more than one individual, except in the case of churchwardens.

Now, it seems that two of the witnesses examined in the cause, are members of the select vestry, and supporters of Mr. Brownsmith, for whom they voted in 1839; and it appears that the three promoters themselves are members of the select vestry, and also supporters of Mr. Brownsmith, having voted for him. These are circumstances which should lead the Court to look a little minutely into the evidence in support of the Articles. Here are three witnesses to prove the charge, two of whom are members of the select vestry, and supporters of Mr. Brownsmith, and who attended (as they state) at the church that day to support Mr. Hopkins' right to officiate, and these are the only persons (except Mr. Hopkins) who were called to support the charge against Mr. Byron.

The first witness is Mr. Perkins. He states that he is an inhabitant of the district, and one of the select vestry; that on the 7th of July, 1839, about ten minutes before eleven o'clock, he was in the organ-loft, with Mr. Cooke, his fellow witness, and found Hopkins there, waiting to play the organ, as he had done many times before; that, just upon the stroke of eleven (when the service commenced), Byron, who had possession of the key of the organ, came into the gallery, accompanied by Calkin and Calkin's brother. I may here observe, that the Court is not sitting here to inquire whether M. Byron did right in refusing to deliver up the key of the organ, or in engaging a person to play the organ in the absence of Mr. Brownsmith; that is no part of the duty of the Court; the simple sub-

jeet for my inquiry is, whether in the performance of what he considered to be his duty, he exceeded the bounds of decorum which he ought to observe, and particularly whether he was guilty of quarrelling, chiding, and brawling, and laying violent hands upon any person.

The witness then states that Hopkins was at this time seated on the stool in front of the organ, prepared to begin the service ; that Mr. Byron and his two friends came in, quite in a hurry, and, without any one of them saying one word, Calkin went close to the stool on which Hopkins was seated, " and," he says, " as well as I could see, who was on the opposite side, Mr. Byron, with his shoulder, either shoved Hopkins himself, or shoved Calkin so that he shoved Hopkins with such violence, as to throw him off the stool, and knock him against me, and he fell against me with such force, that I was myself thrown aside, and struck myself against the organ-door on that side, and banged the organ-door back. A very great noise was occasioned. Mr. Byron was in a great passion. Mr. Cooke said to him, ' Mr. Byron, this is very unhandsome conduct ;' I don't recollect his using the word " Assault ;" but Mr. Byron made answer, in a sharp and angry manner, ' If I've committed an assault, you've got your witnesses, and you may bring your action as soon as you please.' Mr. Calkin had by this time got on the seat, and begun playing the organ, for Mr. Byron had unlocked it at the moment he shoved Mr. Hopkins." On the interrogatories, something of a different account is given. The witness says, that he went to the organ-loft on the occasion, of his own accord, to protect Mr. Hopkins, " expecting Mr. Byron

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would use some violence to Mr. Hopkins, knowing him to be a petulant person, who does not care what he does." He says, "I called on Mr. Cooke on my way, or met him in the road. I have no doubt that Mr. Hopkins went there to assert his right to officiate at the organ, as Mr. Brownsmith's deputy, and if any one opposed him, to dispute the possession of the organ-loft for the day. I did go to protect him from violence, and so far to aid and abet him in his proposed assertion of his right; but there was nothing in the nature of a previous arrangement." He says, that the case is not truly described in the Responsive Allegation; that Hopkins was seated on the stool in front of the organ, before they came in, or got on it just as they came in; Mr. Cooke told him to seat himself there, and he did so, and he adds, "I cannot say that I saw the defendant strike, or smite Hopkins; I was on the opposite side of Hopkins to Byron, who might have struck him without my seeing it;" and he denies that the shove was occasioned by the motion of Byron's arm in opening the organ-door, "because that door was pushed back before the shove was given."

The second witness is Mr. Cooke, a surgeon, also one of the select vestry, and he is the father-in-law of Mr. Brownsmith, the organist, therefore his evidence must be taken with some degree of allowance on that account. He says that, as one of the select vestry, he was there to see the duty of organist performed; but I do not know that this is the particular duty of the select vestry; that duty is done by the Churchwardens; and it appears by the evidence of the Rev. Mr. Irvine, that Mr. Byron

had been directed by him to do so. I do not say that Mr. Irvine had a right to give him this direction ; I say nothing of the rights of any one ; but Mr. Byron acted by the direction of Mr. Irvine, though that would not be sufficient to justify him if he has been guilty of the offence imputed to him.

Mr. Cooke states that, on Mr. Perkins and himself arriving in the organ gallery, they found Hopkins seated on the organist's stool ; that when Mr. Byron came, he was somewhat excited ; his manner was hurried, and seeing Hopkins on the stool, he asked, in an angry and dictatorial manner, " Who are you, Sir ?" Hopkins replying that he was Brownsmith's deputy, Byron answered, in his former angry manner, " I know nothing of any deputy of Mr. Brownsmith," and proceeded to unlock the organ. Now, this is a totally different account from that given by Perkins, who says that Byron, on his coming into the organ-loft, " without saying one word," shouldered Hopkins off the stool. It is extraordinary that these two gentlemen should give such a different account of the transaction, and still more extraordinary when we read the account given by Hopkins himself. Mr. Cooke proceeds to depose, that Hopkins just vacated the seat to allow of the doors of the organ (which are of considerable size) being opened, when Calkin got upon the stool, and so did Hopkins, at the suggestion of the witness, who said, " You had better take your seat and begin the service." Byron then interposed, and " placing his hand or arm between the two, he, with his shoulder, gave Hopkins a shove, and knocked or pushed him off the stool," which caused him to fall against Perkins,

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knocking him against the door of the organ, which flew back with a great jar and noise, which must have been heard. Some observation was then made by some one, he quite forgets by whom, in the way of remonstrance at Byron's conduct, but quite calm. He believes the word "assault" was used, and in reply, Byron said either, "I admit I have committed an assault," or, "If I have committed an assault, you can bring your action as soon as you like." This he said in a very angry tone: he was greatly heated then. He says, "I did not see any smiting, and I do not know that I should be justified in using the strong terms articulate to describe Mr. Byron's conduct, *viz.*, 'a quarrelsome, violent, chiding and brawling manner.' He was excited, certainly; much excited, and got warmer as he went on, and spoke both to Mr. Hopkins and ourselves in a very rude and imperious manner, and quite unbecoming the sacredness of the place and occasion; and it so disturbed my mind, and that of Mr. Perkins, and Mr. Hopkins also, that we could not attend divine service, but left the church altogether, and went all of us to my house." In answer to the interrogatories, this witness admits, that in fact he was the person who used the word "assault" on the occasion, the words being, he believes, "What you have done amounts to an assault upon the young man," though he says he is not clear about the words. But he swears positively that Byron said in return, "Bring your action if you think fit; I have also my witnesses, Sir." The words used by Byron were in answer to a remark coming from Cooke, and as they are in themselves equivocal, it

depends upon the manner in which they were uttered whether or not they amount to brawling; they may be offensive and insulting, or they may be mild, and a mere answer to the observation. I cannot say, from the evidence of these two gentlemen, and considering the interest in which they come forward, and the fact disclosed, that both of them were subscribers in the first instance to a list of members of the select vestry, for the purpose of bearing the expense of an action against Mr. Byron of some kind or other, not in this Court, though they afterwards withdrew their names; I say, looking at the evidence of these two gentlemen, I am not prepared to say that it makes out the offence even of chiding, brawling, and quarrelling, considering that Mr. Byron was acting under the direction of the minister, to see that there was a proper substitute for the organist. To some extent, their evidence negatives the plea; and though I agree with the counsel for the promoters, that it is not necessary that the witnesses should swear that the party was actually guilty of chiding, brawling, and quarrelling, there must be sufficient evidence from which the Court can collect that such was his conduct. I should, therefore, be of opinion, as far as their evidence goes, that the offence of chiding and brawling is not made out; and the more so, since, notwithstanding that the congregation were assembled in the church, immediately previous to the commencement of divine service, not a single individual has been called who heard the altercation in the organ-loft; no witness but Mr. Hopkins and these two persons, who support his pretensions.

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But let us look at the evidence of Mr. Hopkins. He states that he was, at the date of the occurrence, an inhabitant of the district; that he was engaged by Mr. Brownsmith to assist him at the organ, as his deputy, in March, and subsequently, when he performed the duty without interruption; that on the 7th July, at a quarter before eleven, he went into the organ-loft by himself, and in about three minutes after, Mr. Byron came into the gallery alone, looked at him, and asked him his name, "quite in a mild tone of voice," to which the witness replied merely, "Hopkins," whereupon Mr. Byron made no remark, but merely bowed slightly and politely and went away;—that in about two minutes after, Mr. Cooke and Mr. Perkins entered, to whom he mentioned what had occurred, and that Mr. Byron had not unlocked the organ; that about three minutes before eleven, Byron again entered the organ-loft, at the opposite door to which he had entered before, accompanied by Mr. Calkin and his brother, and without saying a word to the witness Cooke or Perkins, all of whom were standing carelessly together, began unlocking the organ door; that while doing so, he said, "Mr. Brownsmith is not here to do his duty; Mr. Calkin, take the organ;" that he (the witness) then said, he attended as Mr. Brownsmith's deputy, on which Byron answered in a peremptory tone, "I don't know you, Sir; Mr. Brownsmith should be here himself, Sir;" that Mr. Cooke then said to Byron, "You know very well that Mr. Brownsmith cannot be here," and then Mr. Cooke and Mr. Perkins desired the witness to get upon the stool; that he hesitated at first, through fear, there appearing by

this time to be a good deal of excitement on both sides, though no more angry words had passed, but there was confusion, and he was afraid that if he got on the stool, he should be knocked off. So that, by Mr. Hopkins's account, (and nothing can be more candid) he was not on the stool at this time. The witness proceeds: "Mr. Perkins then said, 'Never mind him,' meaning Mr. Byron, 'get upon the stool.'" This is very different from the representation of Mr. Perkins or of Mr. Cooke; the brawling here, if there was any brawling, was by Mr. Perkins himself. I think there is a great deal of confusion in the evidence, and that one occasion must have been confounded with another. "Mr. Byron said, 'If he attempts to do so, I'll order the beadle to turn him out,' and he added to Mr. Perkins and Mr. Cooke, 'and you too: how dare you to interfere with my duty! The organ is my property, and nobody shall touch it but whom I think proper.'" It is most extraordinary that these circumstances should have taken place, without being noticed by the other witnesses; I think Mr. Hopkins must have confounded this with some other occasion. "Mr. Cooke and Mr. Perkins, however, encouraged me to the attempt, by saying, 'Get upon the stool, get upon the stool; don't mind him!'" This is the evidence of a witness on behalf of the promoters. "I did attempt to do so, and at the same moment, Mr. Calkin was getting on the stool on the opposite side. In attempting to get upon the stool, I received a push on my left shoulder, but whether it was from Mr. Byron or Mr. Calkin, I could not see, though from the respective positions in which we were, I should

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say it came from Mr. Byron. On receiving this push, which must have been a smart one, as it so excited me that I nearly lost my senses, receiving such treatment in such a place, I stumbled off the stool, and fell against something on my right side, which I supposed was the organ, as I heard a great slam of the organ-door, and but for my coming in contact with this, I must have fallen on the ground. Mr. Cooke exclaimed, 'an assault!' I only heard these words, but he repeated them a second time, and stepped forward to make the exclamation, and Mr. Byron in a sharp tone replied, 'Very well, bring your action if you like,' Here, then, it is Mr. Cooke who uses the word "assault;" and he and Mr. Perkins are the persons to urge Hopkins to get upon the stool, and not to mind Mr. Byron. This is a different representation from the accounts given by Mr. Perkins and Mr. Cooke; I do not mean to say that these gentlemen have deposed with an intention to make an improper representation; but that they have taken up a wrong impression of the facts to which they were called to depose. But it is impossible, upon this evidence, to hold that this gentleman has been guilty either of the offence of chiding, brawling, and quarrelling, or that of laying violent hands upon Mr. Hopkins; indeed, it is hardly contended that there is sufficient proof of smiting.

On interrogatory, Mr. Hopkins states some circumstances, which show that his fellow witnesses have taken an active part, not perhaps in the present proceedings, but in some proceedings against Mr. Byron, for his conduct on this occasion. He states that he attended at Doctors' Commons in

company with Mr. Cooke, and at his request; that he was interrogated by him on the subject at the proctor's office, and in reply to the question whether Mr. Byron had assaulted him, the witness stated, that "he could not say that he had done so." He says that he was requested to take some legal proceedings against Mr. Bryon, but he declined so to do, as he did not wish to mix himself up any further in the matter; and he states that "he has heard and believes, that some subscription was entered into in the vestry towards the promoter's costs, and that the names of Mr. Cooke and Mr. Perkins were first down." Both these gentlemen admit that they did sign their names to a promise to contribute to the expense of some proceeding, but not this suit, though they withdrew them a day or two afterwards. But, although they are competent witnesses, they are members of the select vestry, who are supporters of Mr. Brownsmith, as well as the promoters, and it shows that this matter has not been taken up in the spirit in which cases of this description ought to be, by persons who are the voluntary promoters of the Office of the Judge.

This then is the evidence produced in support of their case by the promoters themselves; only three persons present in the organ-loft, not a single individual who was in the church to show that there was anything like confusion or disturbance produced in the minds of the congregation. I am of opinion, that, on their own shewing, the promoters have not established their case as to the charge of chiding, brawling, and quarrelling; neither of the witnesses will swear that the words

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were uttered in a quarrelling, brawling, and chiding manner ; and there is nothing in the words themselves, independently of the demeanor and conduct of the party, that should lead the Court to the conclusion that the party was guilty of the offence ; and there is no smiting or laying violent hands upon any one established even by their own evidence. I am of opinion, therefore, that they have failed in establishing their case against Mr. Byron altogether. But when I look to the evidence on the other side, I find a different representation of facts and of the conduct of Mr. Byron, and there is no more reason why these witnesses should give that conduct too light a colour, than that the others should make it too dark ; one class of witnesses may desire to support the rights of Mr. Brownsmith, and the other to assert the innocence of Mr. Byron of the charges alleged against him ; and one class is as credible as the other. It is not for the Court to inquire into the motives of parties in proceedings of this kind, which are instituted *ad publicam vindictam* ; but when the Court sees what has taken place in the parish, and the proceedings of certain persons in the select vestry, which have come out in evidence in this case, I do not think the transaction calls for the interference of the Court, to the extent of prohibiting Mr. Byron from entering the church, still less of condemning him to excommunication and imprisonment. I am, therefore, of opinion that the promoters have failed in the proof of their Articles, and that Mr. Byron is entitled to be dismissed from the suit. The only question is as to the costs ; and

taking into consideration all the circumstances, I think I shall meet the justice of the case by leaving the parties to pay their own costs. I dismiss the party, and make no order as to costs.

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PREROGATIVE COURT OF CANTERBURY.

CHAMBERS *and* YATMAN *against* The QUEEN'S PROCTOR.

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This was a cause of proving in solemn form of law the will of Thomas Thompson, Esq., deceased, promoted by Robert Joseph Chambers and William Yatman, Esqrs., the executors, against the *Queen's Proctor*, the deceased having left no known relations.

The will bore date and was executed on the 15th of November, 1839; and early on the morning of the 16th, the deceased destroyed himself, and was found, under a coroner's inquest, to have been in a state of insanity.

The will was in the handwriting of the deceased, and was as follows:—

“ I, Thomas Thompson, of the Inner Temple, being in sound health, but considering the uncertainty of human life, make this, my last will and testament.

“ I appoint my friend, Robert Joseph Chambers,

The will, dated and executed on the 15th November, 1839, of a testator who was labouring under certain delusions on the three previous days to its execution, and who destroyed himself on the day following (the 16th) while under temporary insanity, pronounced for, and the costs of the *Queen's Proctor*, who opposed the will on behalf of the Crown, refused.

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of the Middle Temple, Esq., and my friend William Yatman, of Great Russell Street, Bloomsbury, Esq., to be the executors of this my will.

“ I bequeath my landed property, freehold and copyhold, according to the tenure thereof, absolutely and for ever to Robert Joseph Chambers aforesaid.

“ I bequeath two thousand pounds sterling to William Yatman aforesaid.

“ I bequeath nine thousand five hundred pounds stock, standing in my name in the 3 per cents. reduced, to my friend William Murray, of the Middle Temple, Esq.

“ I bequeath one thousand pounds sterling to the Rev. Mr. Rowlatt, Reader at the Temple Church.

“ I bequeath five hundred pounds sterling to Mrs. Jane Lucas, widow of the late Mr. Daniel Lucas, nephew of the late Robert Martin, of Homerton, Holloway, Esq.

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“ I bequeath ~~twenty~~ pounds sterling to each of my servants, M. Pugh and E. Dawkin, now living with me.

“ The rest of my personal property, after paying my funeral expenses and all my just debts, and also what I may bequeath by codicil hereafter, I bequeath to Robert Joseph Chambers aforesaid, and leave and appoint him my residuary legatee.

“ It is my wish that my body be buried in the Temple Church-yard; but I leave to my friend Robert Joseph Chambers the care of keeping in repair the tomb in Hackney Church-yard, in which the mortal remains of Mrs. Martin and my mother were deposited.

" I hereby revoke all former wills, and declare this only to be my last will and testament; in witness whereof I set my hand and seal, this 15th day of November, 1839.

 Seal.

" THOMAS THOMPSON.

" Signed, sealed, declared and delivered by the said testator, Thomas Thompson, as his last will and testament, in the presence of us.

" LOUISA LUCAS,

" JOHN WOOLFITT,

" CHARLES ELLIS."

A *caveat* having been entered by the *Queen's Proctor*, the executors propounded the will, and examined the three attesting witnesses. (a)

(a) The evidence of the attesting witnesses was to the following effect :—

Charles Ellis.—I was acquainted with the late Thomas Thompson from the month of February, 1832, to his death. I am, and have been for several years, in the employ of Mr. Woolfitt, of Fleet Street, Upholsterer, who was employed by the deceased to furnish his chambers in Harcourt Buildings, and on other business. I must on an average have seen and conversed with him two or three times a week for the last three or four years. On the 15th November last, I, in the morning, received a note from the deceased, begging me to call on him; I did not go to him immediately, in consequence of which he wrote a second note to Mr. Woolfitt, desiring my attendance. I went to the deceased between twelve and one o'clock; the deceased at first asked me the amount of his account due to Mr. Woolfitt. I told him it had not been made out; the deceased then said that he wished to give a cheque for it, and begged that his account might be made out by the time he should call on Mr. Woolfitt, and he appointed three o'clock on the same afternoon

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for his so doing ; he also said that he should at the same time bring with him his will, to be witnessed by Louisa Lucas (who was a young woman employed in Mr. Woolfitt's shop), Mr. John Woolfitt and myself, he so named us, and I recollect his saying, " You have done the same thing before for me." At three o'clock the deceased came to Mr. Woolfitt's ; that is to say, I having been out, on returning there at three o'clock, found the deceased already in the shop, sitting at a table, and with him Mr. John Woolfitt, and Louisa Lucas ; the deceased addressing me, said, " Mr. Ellis, to business, refer to my account." I told him what was the probable amount, the account not having been exactly made out, upon which the deceased wrote a cheque on his bankers, Messrs. Hoares, for such amount, which he paid to Mr. Woolfitt on account. The deceased then from his pocket-book produced a paper, which I found was his will, and he then in my presence, and in the presence of Mr. John Woolfitt and of Louisa Lucas, pointed out an erasure in the said paper, namely, the alteration of the sum of " twenty" to " forty," calling my attention to it, and at the suggestion of Mr. Woolfitt, the deceased set his initials against such alteration ; I believe that the words used by the deceased to us, the witnesses, were, " I wish you to witness my will," or to that effect ; he said very few words ; *I did not see the deceased sign the said will*, but there was a signature and a seal affixed to it. At the time of his asking us to witness his will, the deceased pointed to or touched the seal, *the signature being then already written*. We, that is, Mr. Woolfitt, Louisa Lucas, and I, then, in the presence of the deceased, and in the presence of each other, being all present at the same time, subscribed our names as witnesses to the said will, the order of our signing I do not remember. When the will had been so witnessed, the deceased folded it up and put it into his pocket, and almost immediately went away. Very little else passed beyond his taking leave in an ordinary manner. I suppose that between half an hour, or perhaps three-quarters of an hour passed before the deceased left the shop on that occasion. I have no recollection of any particular conversation, besides what I have related, which took place between the deceased and either of us the witnesses, none other having been present on the

occasion before mentioned. The deceased was, during the whole of the time that I was so present with him, and time of his producing his will and our witnessing the same, calm and collected, and as I believe, of sound, perfect, and disposing mind, memory, and understanding; there was not an action or a word done or spoken by the deceased which could have led any one to believe the contrary. The witness then identified the will.

To the 6th Interrogatory the witness answered: "The deceased himself produced the said will on such occasion. The only part of the said will which was written after the same was produced by the deceased, was the addition of the deceased's initials, 'T. T.,' between the fourth and fifth lines of the second side thereof, which initials I believe were added and written by the deceased after we, the attesting witnesses, had subscribed our names. The said will had been signed and dated (as now appears therein) before it was produced to me."

Louisa Lucas gave a similar account of the deceased's coming to Mr. Woolfitt's, and giving him a cheque, and proceeded, "The time when my attention was first called to the paper which I on that occasion witnessed, was when Mr. Woolfitt, after he had given the receipt, called me, saying, "Now, Louisa." I was then in the counting-house in the shop, and quite near where Mr. Thompson was sitting, but until I then came to the table I had not noticed the said paper. I recollect that after I so came forward, I saw Mr. Thompson with his own hand make an alteration in it; I recollect Mr. Thompson saying these words, "I have altered it from twenty to forty." Mr. Woolfitt, I also remember, said to him, "You had better put your name against it," and I saw Mr. Thompson write his name, or the initials of his name, I forget which, to the alteration which he had so made. Mr. Thompson then, in the presence of Mr. Woolfitt, and of Mr. Ellis, and of myself, pointing to the said paper, and to a seal on it, said to me, "Miss Lucas, this is my will, and this is my seal." I cannot say that I saw Mr. Thompson sign the said will, except the alteration which he signed in the margin. I do not recollect that Mr. Thompson said anything about his signature to the said paper. I can-

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not take upon myself to swear, from my present recollection, that I did notice whether at such time the said will had or had not been signed opposite to the seal or at the end thereof. * * * * * From all that I saw of Mr. Thompson on that occasion, and heard him say and converse about, I believe him to have been at such time of sound mind, memory, and understanding; he was very calm and collected on that occasion, and I believe him to have well known what he then said and did, and what was said or done in his presence; his manner and conversation were those of a person perfectly rational and sensible; I saw nothing to the contrary.

To the 6th Interrogatory she answered. "I did not see the said will actually produced, it was on the table at which Mr. Thompson was then sitting when I first saw it; I do not believe that any part of the same was written after I so first saw it, except the alteration made by an obliteration in the fifth line of the second side or page thereof, and interlineation over the same of the word 'forty' with the initials 'T. T.' I did not see the signature, 'Thomas Thompson,' or the date 15th, written therein by the deceased; I believe that the same were so written previous to my seeing the said will."

Mr. Woolfitt's account of the execution was as follows: "It was after Mr. Ellis came in, and in his presence, as well as in the presence of Louisa Lucas, and of myself, that the deceased produced his will, out of which pocket, or in what manner precisely he produced it, I did not sufficiently notice, so as to recollect, but he laid it on the table before him, and having done so, he said to me, (as I stood over him) and pointing to an alteration, (then already made in the said will) 'I have made an alteration of twenty to forty, what had I better do?' I replied, 'Why, Sir, you had better do as solicitors say, set your initials against it,' the deceased seemed pleased at what I said, and with a pen wrote his initials against or over such alteration; when he had so done, he, the deceased, then in my presence, Mr. Ellis and Louisa Lucas being also present, signed his name, 'Thomas Thompson' at the end of the said will, opposite the seal thereon, and upon which he placed his finger, and he

also wrote the date on the will, how much of it I do not remember. When he placed his finger on the seal, he said, 'this is my act and deed;' the deceased after so doing turned the will round to Louisa Lucas, who signed her name, and I next signed mine, and lastly Mr. Ellis signed his name. We, the witnesses, were all present at the same time with Mr. Thompson, as well when he signed his name to the will, as when we respectively subscribed our names thereto. From all that I saw of the deceased on the said occasion, I have no reason to believe that he was other than a man of sound, perfect, and disposing mind, memory, and understanding; in his manner and conversation on such occasions, he was quite rational and sensible, and, therefore, I believe that he was then capable of making and executing his will, and of doing any serious or rational act of that or the like nature, requiring thought, judgment and reflection."

To the 6th Interrogatory.—"It was the deceased who produced the said will, the figures '15,' and the names 'Thomas Thompson' therein, were written after the said will was produced. I am positive that the names, 'Thomas Thompson,' and the said date, '15,' were written by the deceased in my presence on the said occasion, and that the same were not written previous to the production of the said will to me, on such occasion."

An allegation was afterwards admitted on behalf of the Crown, pleading,

1st. That the deceased died by his own hands on the morning of Saturday, the 16th of November, 1839; that he was of the age of sixty years or thereabouts, and died a bachelor without any known relations, and without having made any will valid in law, leaving personal estate of the value of about 25,000*l*.

2nd. That the said deceased was, for some years before, and down to his death a person of strange and eccentric habits, very irritable and hasty in his temper, violent in his language, and jealous and

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sensitive of what he considered personal slights on the part of his friends and others, that he was dull and morose in his temper, and had long before his death lived a retired and secluded life ; that during the last two or three years he became subject to delusions or fancies of the mind, but more particularly so during the last twelve months of his life, that the deceased formerly occupied chambers in Paper Buildings, in the Temple, that on the 6th of March, 1838, the same were consumed by fire, that, on that occasion the deceased was in danger of losing his life, and from that period became more excited and irritable than before, that he frequently declared to his intimate friends or acquaintance that he had become an object of scorn and contempt, not only to them but to the whole world, from not having resented some insult which he supposed himself to have received in the street from a person he never knew. That his friends endeavoured by every means to dispel such delusion, and to assure the deceased that they had the same opinion of him as ever, that such idea or delusion was so strongly impressed upon the mind of the deceased that he declared it would be necessary for him to leave the country, and hide himself in some foreign land. That the intimate friends of the deceased having altogether failed in removing such delusion, communicated with and represented to the medical attendant of the deceased their opinion that he was of unsound mind.

3rd. That at the latter end of 1838, or beginning of 1839, the deceased, whilst labouring under delusion of mind, called upon William Yatman, party in this cause, and told him that he was in a worse

dilemma than ever, and that the benchers of the Inner Temple were going to take measures to dis-bar him, in consequence of a fraud which he (the deceased) had perpetrated upon them, in having represented himself upon his admission as a member of the said Inn, as of the degree of an esquire, his father being only a chemist, that the deceased then declared that he was a lost man, and that Mr. Yatman must get him out of the country. That no measures to dis-bar the deceased were ever taken or contemplated by or on the part of the society of the Inner Temple. That Mr. Yatman, well knowing that it was entirely the effect of delusion which had been for some time before, and was then, operating upon the mind of the deceased, reasoned with, and did all in his power to dispel such delusion.

4th. That the delusion, above pleaded, still continuing to operate upon the mind of the deceased, he, on Tuesday, the 12th of November, 1839, called unexpectedly upon Mr. Yatman, and in great distress of mind, addressing him said, (amongst other incoherent things) "You must get me out of the Temple directly ; every eye is upon me in the Temple ; will you advise me where I can go ; I must go to Calais this night," or to that effect. That Mr. Yatman endeavoured, by reasoning with the deceased, to calm his mind, and to dispel the delusion under which he so strongly laboured, but without effect.

5th. That on the next following morning (the 13th of November) a further interview took place between the deceased and Mr. Yatman, that the deceased then appeared to be, and was, much more disturbed in his mind than he ever before appeared to

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have been, that the deceased, then addressing Mr. Yatman, said that he was the victim of a most foul conspiracy, that he had seen it in a book in a circulating library, and it had been practised on him in a drawing room, and that the conspiracy would drive him to self-destruction, or in words to that effect.

6th. That on the next following day (the 14th of November) Mr. Yatman and the deceased again met when the deceased asked Mr. Yatman if he had thought of anything for his relief, that Mr. Yatman replied that he had, and promised to see him again on the Sunday following, that the deceased then said, "Pray do all you can for me, or it will have a fatal termination," or to that or the like effect.

7th. That Mr. Yatman, being satisfied of the insanity of the deceased, consulted the immediate personal friends of the deceased as to the necessity of some steps being taken for the protection of the deceased, so as to prevent any fatal consequences from his then insane state of mind, when it was agreed between Mr. Yatman and the several persons with whom he so consulted, that as they were neither related to or connected with the deceased, and did not know or believe that he had any relation living, nothing more could be done than to watch the deceased.

8th. That the deceased was not, on the 15th of November, being the date of the will of sound mind, &c.

9th. That about 10 o'clock on the next following morning (Saturday, the 16th of November, 1839,) one of the servants of the deceased having knocked at his master's bed-room door, and receiving no answer, entered the room, and then found the de-

ceased dead ; that on the same day an inquisition was held before the coroner and a jury, then assembled in his chambers, that the jurors upon their oaths found, as the fact was, that the said Thomas Thompson, not being of sound mind, memory, and understanding, but lunatic and distracted, and in a state of insanity did kill himself; and such verdict was accordingly returned.

10th. The tenth pleaded a copy of the Inquisition.

To this allegation the answers of the executors were given, and

1st. They admitted the first Article to be true, except that they denied that the deceased died without a valid will.

2nd. They denied that the deceased was a person of strange and eccentric habits, very irritable and hasty, or dull and morose in his temper, and violent in his language.

They admitted that he was jealous or sensitive in respect of what he might consider personal slights on the part of his friends or others, and that he had for some time before his death led a somewhat retired and secluded life.

They admitted that at times during about the last year of his life, the deceased was subject to certain mental fancies or delusions on one or two particular subjects ; that he formerly occupied Chambers in Paper Buildings, in the Temple, and that when they were burnt (6th March, 1838) the deceased might be in some danger of his life, and that the temporary effect thereof (to which extent only they admit the fact to have been) was to render the deceased somewhat irritable and excited.

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They disbelieved and denied that the deceased frequently declared to his friends or acquaintance that he had become an object of scorn and contempt, not only to them but to the whole world, from not having resented some insult which he supposed himself to have received in the street from some person unknown to him. They believed, however, that he did sometimes (not frequently) express himself to some such effect to some one or two of his intimate friends; and Mr. Yatman admitted that he so expressed himself to him on a single occasion, in November, 1838, and Mr. Chambers admitted that he so expressed himself to him on one or two occasions, at or about the same period when he (Chambers), believing the deceased's fancies to be consequent upon a disturbed imagination, arising from a disordered state of the stomach, so represented to the deceased, who admitted it might be so, and promised to physic and diet himself accordingly, and which having done as he afterwards assured respondent (Chambers), he felt, as he also assured respondent, the beneficial effect thereof in the thorough removal of such fancies or impressions from his mind.

They admitted that such idea or delusion might at times, but at times only, be so strongly impressed on the mind of the deceased as to induce him to declare that it would be necessary for him to leave the country and hide himself in some foreign land, or to that effect.

They denied that the intimate friends of the deceased either failed in removing such delusion, or represented to the deceased's medical attendant their opinion that he was of unsound mind. They

admitted that one of such friends (Dr. Shepherd) did throw out an expression to that effect in casual conversation with his friend or acquaintance, Mr. Copeland, being the surgeon then in attendance on the deceased for a painful disease, viz., a disease in the rectum, which often compelled the deceased to resort to surgical aid for relief.

3rd. Mr. Yatman admitted that on the 12th November, 1839, the deceased called on him, and told him that he was in a worse dilemma than ever, and that the Benchers of the Inner Temple were going to take measures to disbar him in consequence of a fraud which he (the deceased) had practised upon them as pleaded, and declared that he was a lost man, and that respondent (Yatman) must get him out of the country. That believing what the deceased said to be the effect of delusion, then operating on his mind, he did all in his power to dispel such delusion.

They admitted that no measures to disbar the deceased had ever been taken or contemplated by the Society of the Inner Temple.

4th. Mr. Yatman admitted the same to be true, save that he denied that his efforts by reasoning with the deceased, to calm his mind and dispel the delusion were without effect, for he said the same had the effect of calming the deceased's mind, and dispelling his delusion, at least for a time.

5th. Admitted to be true.

6th. Admitted to be true.

7th. To the seventh Mr. Yatman answered, that believing the deceased to be in a very disturbed and excited state of mind, he did at the time articulate speak to two personal friends of the deceased, whom

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he sought out for the purpose, as to whether some step had not best be taken for the deceased's protection, and lest some fatal consequence should ensue from his then mental condition, when he admitted that it was mutually agreed between such two friends and him (Yatman) that nothing could be done beyond watching the deceased; he denied that such conclusion was come to for the reason stated (neither of them being related, &c., to the deceased), but because they considered there was nothing in his then state of mind which would authorize any attempt to put a restraint upon the deceased,

8th. They denied that the deceased was on the 15th of November of unsound mind, &c.; they admitted, however, that he might be on that day, and had been for some time before, and might be on the day after, at times (but at times only) under fancies or delusions, the offspring of a disturbed imagination; and that he did on the day articulate commit suicide, being at such time in a state of temporary mental derangement, in part owing, as they conceived, to the bodily anguish which he suffered at times from his aforesaid disease, in part to mental disquietude, arising from the terror and alarm with which he contemplated a surgical operation that he was about to undergo for its cure, and which Mr. Copeland was to have performed upon him in the course of a few days. They disbelieved, and therefore denied, that the transient impressions (notions, fancies, delusions, or what else) under which they admitted the deceased at times to have laboured, ever constituted insanity in the proper sense of that term; but if they did, still they the respondents disbelieved

and denied that such insanity was in any sort or degree in operation at, or during any part of the time in which the deceased was employed in the making and execution of his last will and testament; on the contrary, they verily believed that such the deceased's last will and testament (being, they submitted, a rational act, in all respects rationally done by the deceased) was in no sort or degree the offspring of, or proceeding from, or connected with, any insanity under which the said deceased may have laboured at any time, even admitting (which, however, they denied) that he was ever, properly speaking, insane.

9th and 10th admitted to be true.

One witness only was examined in support of the allegation opposing the will, namely the Rev. Dr. Shepherd, who deposed to the following effect.

1st and 2nd. To the first and second articles—"I first became acquainted with the late Thomas Thompson, Esq. about forty years ago, at which time I was a fellow, and he was an undergraduate of University College, Oxford, and I thenceforward continued to be acquainted with him, rather intimately than otherwise during the remainder of his life." "The last time of my seeing and having personal communication with the deceased, was about ten days previous to his death, I can hardly term the deceased to have been an eccentric character; he, as many persons are, who have lived and are in the habit of living much alone, had his peculiarities, he was very irritable, but from my own personal knowledge I cannot depose to his use of violent language." "Knowing his temper, I was careful to avoid subjects or occasions of dispute with him, he was of a temperament strongly inclined to pride, he was suspicious, and extremely sensitive of any thing which could be construed into a neglect, or an affront. It was not until the latter end of 1838, or beginning of 1839, that I became aware that a delusion had taken possession of and fixed itself in the deceased's mind. I then

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found that under such a delusion, and, as I believe without any foundation the deceased imagined that he was slighted and shunned by all the world, (that is, by all his friends and acquaintances) on account, as he imagined, of his not having resented some supposed insult. Several years previous to the year 1838, I called on the deceased at his request, when he asked me whether I had heard anything to his discredit, to which I replied in the negative, but no explanation was entered into. I recollect that he occupied chambers in Paper Buildings, in the Temple, which chambers were consumed by the fire which happened there in March 1838, the deceased, as I have reason to believe, was thrown into a state of great alarm by such the destruction of the chambers which, at the time, he was occupying. That event I consider was not without its effect on the mind of the deceased. I do consider that he was in all probability after that time more irritable and excitable than before, although I am not able to call to mind any particular circumstance to illustrate such my opinion. I have, subsequent to the period before mentioned, namely, since the commencement of the year 1839, as one of the deceased's friends, endeavoured to dispel the delusion which had possessed him as before mentioned—for instance, when he talked of all the world slighting him; I asked him to point out any individual who had so treated him; he did name an individual who had so done; I called on that individual, and finding that there existed no ground for the deceased's notion, I communicated it to him, and he became satisfied that his suspicion, as regarded the individual in question was groundless. At my suggestion, on a subsequent occasion, another friend of the deceased interfered to undeceive him in respect of his notion that another individual had slighted or insulted him; the result of such interference I am not of my own knowledge able to depose, but I have reason to believe that it was successful. After the time of my having, as before mentioned, succeeded in convincing the deceased, (as I believe I did) that the individual named had not slighted or insulted him, it did appear to me that the impression on the deceased's mind, that he was an object of universal scorn, by degrees became weakened, and, as it seemed to me, was effaced. At about the time of my interfering to undeceive the deceased in

respect of the delusion before mentioned, the deceased was, as I knew, under the care of Mr. Copeland, for the treatment of a surgical complaint, and I called on Mr. Copeland, and requested him to direct his attention as well to the mind as to the body of his patient. I did not on that or any other occasion represent to Mr. Copeland, or any other medical adviser of the deceased, that it was my opinion that the deceased was of unsound mind, nor did I intend to convey the idea that such was my opinion; but I did state that Mr. Thompson was under a mental delusion on one point which I explained, being the delusion to which I have already referred. I do recollect that at the period of the deceased being under the delusion as aforesaid, he certainly did declare that it would be necessary for him to leave the country and hide himself in some foreign land, or he expressed himself to that effect."

8th. "I did not see the deceased on the 15th of November, 1839, I do not believe that I had seen him within the last ten days of his life; the last occasion of my seeing him was, when about that time he called on me at my residence in Russell Square; it was a friendly call, he on the behalf of a friend, making of me an inquiry about a school, on which subject I gave him a reference to one better able than myself to give him the information he required on that occasion; there was not in the deceased's manner or mode of conversation anything remarkable one way or the other; he was quite rational and sensible in his conversation, and from what then occurred I am not able to depose otherwise than that it appeared to me, and it is my present opinion, that the deceased was at that time of sound, perfect, and disposing mind, memory, and understanding, well knowing and understanding what he then said and did, and what was said and done in his presence, and was, as I believe, capable of giving instructions for or of making or executing a will, or of doing any other act of business which required the exercise of thought, judgment, and reflection; I have no reason to believe the contrary."

On the interrogatories.

2nd. "The testator was at all times of gentlemanly manners, courteous in his conduct and demeanour, and generally esteemed by his friends and associates, he was undoubtedly,

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at all times (as I believe) the master of his own person and property, and I firmly believe that he did up to the day of his death, do and perform all acts ordinarily done and performed by persons in the full possession of their faculties, with order, method, and regularity, his general conduct or conversation did not at any time season of frenzy or distraction."

3rd. "I did at one period consider (and I saw him repeatedly during that period) that the mind of the testator was disordered on one point, namely, that of his fancying himself without cause, the object of scorn to his friends and others; it was in the latter end of 1838, or beginning of 1839, that the delusion on the deceased's mind appeared to be strongest, even at that time I did not distrust the deceased's general capacity for transacting his own business and managing his own affairs. It did not occur to me that such delusion was the effect of disordered health, it may have been so, but it is a question which I am not competent to answer. I think that the said delusion did gradually become weaker and weaker, and did disappear altogether by the spring of the year 1839; I did see the deceased occasionally (but not very often) in the course of the spring and summer of the year 1839, and then considered that the delusion before mentioned had passed away. The deceased did dine with me in May, 1839. I do not recollect that he did so after that time; I did not, at or after that time notice anything whatever in the conduct or conversation of the deceased indicating mental derangement; I did see the deceased about ten days next before his death; I did not then observe in him any signs or symptoms of mental delusion."

4th. "Notwithstanding the existence of the delusion on the deceased's mind before mentioned, I never did consider the deceased to be a madman or bereft of his senses, nor as an irresponsible person, nor as a person incapable of doing any legal act or incapacitated from making a legal will."

10th. "There is nothing on the face of the will to shew that it is other than a perfectly rational act . . . I should not have hesitated to become an attesting witness to a will executed by the deceased in my presence, had I been requested on the last occasion of my seeing him."

The *Queen's Advocate* and *Jenner*, for the Crown, before entering upon the question of the sanity or insanity of the deceased, contended, that the will was not duly executed under the statute 1 Vict. c. 26, s. 9, which declares that no will shall be valid, unless the "signature" thereto "be made or acknowledged by the testator in the presence of two or more witnesses present at the same time," as two of the three attesting witnesses deposed that the will was not signed in their presence, and as there was no direct acknowledgement of the signature, *quâ signature*, which is the word used by the act.

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Addams and *Pratt*, *contrâ*.

On the evidence of the witnesses, the signature must have been made, or at least acknowledged, in their presence, and either is sufficient. The statute does not require that the witnesses should see the testator sign; and an acknowledgement need not be in so many words "This is my signature:" a virtual acknowledgement is sufficient.

If the case rested upon the evidence of *Ellis* and *Lucas* it would be doubtful, at the utmost, whether the signature was made in their presence or not; but *Woolfitt's* evidence puts it beyond a doubt.

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I am clearly of opinion, from the result of the evidence, that there is sufficient proof that the paper was signed in the presence of the witnesses. The attestation clause is to the effect that it was "signed, sealed, declared, and delivered" in the presence of the subscribed witnesses. These witnesses, however,

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Court believing, upon the evidence, that the testator did sign the will in the presence of the witnesses, pronounced it to have been duly executed under the stat. 1 Vict. c. 26.

differ very materially in their account of the execution of the paper, as to whether the deceased's signature was made in their presence. The Court believes that all these witnesses have deposed according to the best of their recollection and belief of the circumstances. I give no greater credit to the evidence of Mr. Woolfitt than to that of his co-witnesses, because the latter were in his employment; but there is one circumstance in favour of his testimony, namely, that a person deposing affirmatively is in general to be believed, to a certain degree, in preference to those who depose negatively. The evidence of Ellis and Lucas not only exhibit discrepancies, but the testimony of each is not consistent with itself, and although the discrepancies are not important, they shew that the Court cannot rely upon the accuracy of their recollection; indeed, Lucas seems to be aware that her recollection is imperfect. The other witness, Woolfitt, differs materially from his co-witnesses; and the question is, to which, upon legal principles, the Court should give the greater degree of credit.

Upon general principles, affirmative is better than negative evidence. A person deposing to a fact which he states he saw, must either speak truly, or must have invented the story, or it must be sheer delusion. Not so with respect to negative evidence; a fact may have taken place in the very sight of a person, who may not have observed it, and if he did observe it, may have forgotten it; now Mr. Woolfitt speaks distinctly and positively to the fact, that the deceased signed the will in the presence of all the witnesses, and declared it

to be his act and deed. It is impossible to suppose that he can have invented this statement, and, looking to his habits of business, connected very much with the Inns of Court, I cannot think that he is a very likely person to have been deceived as to such a fact. I see no discrepancies in Mr. Woolfitt's evidence, and when I find a witness so deposing, I am bound to place greater reliance upon his affirmative evidence, as to a fact respecting which he could hardly be mistaken, than upon the negative testimony of the two other witnesses, who have shewn a want of perfect recollection.

There is another circumstance which affords a great probability that the paper was executed in conformity with the statute, namely, that the deceased was a barrister, and, therefore, it is to be presumed (supposing him to have been of sound mind) knew the proper form of execution, which is shewn by the attestation clause; this is something to confirm the testimony of Mr. Woolfitt, and all the *res gestæ* satisfy the Court that Ellis and Lucas must have forgotten that the deceased did affix his signature to the will in their presence.

Being of this opinion, it is unnecessary to consider the second ground, namely, the acknowledgment of the signature, upon which point I give no decision.

So far as the statute is concerned, I am of opinion that the will is proved to have been duly executed.

The argument then proceeded upon the other point, namely, the sanity or insanity of the deceased.

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Addams and *Pratt*, for the executors. What does the evidence to support insanity amount to? Nothing more than that, towards the latter part of the testator's life, at the end of 1838, and in 1839, he laboured under what Dr. Shepherd calls, in one part of his evidence, a delusion, in another part, an impression that he had been slighted, or not treated with sufficient respect, and which might savour, to some extent, of insane delusion. But Dr. Shepherd, who had been intimate with him for forty years, says that he can hardly term him an eccentric character; that, like many others who lived much alone, he had his peculiarities, and was very hasty and irritable; that it was not till the end of 1838 or beginning of 1839, that he became aware of any delusion being "fixed in his mind" (though it was not fixed, since it gave way to reason), when he imagined he was spurned or slighted by the world, on account of his not having resented a supposed insult. This impression, however, gave way to argument and reason; he says it seemed to him by degrees to weaken, and became effaced in the spring of 1839, when he believed him fully capable of making a will. "I should not have hesitated," he says, "to have become an attesting witness to his will on the last occasion I saw him." From the answers of Mr. Chambers, it appears that, shortly before the will, something of that impression did appear, whether from a derangement of health or any other cause; but this is not to render the testator insane. The observations of Lord Eldon in the case of *Macadam v. Walker* (a), are peculiarly applicable to the present case. The true

(a) 1 Dow. 148-177.

question is not whether he had ever been insane before, or from what cause? but whether he was of sufficient sound mind at the time? Suppose the Court was obliged to hold that the testator was not altogether a person of sound mind on a particular point, so slight a delusion cannot affect the validity of such a will as this. If the will had been in the slightest degree connected with delusion or insanity, then, however slight it might be, it would invalidate the will; but supposing the will to be a perfectly rational act in itself, and rationally done, according to the doctrine of this Court, laid down by a high authority (a), which has prevailed from 1793 to the present time, it is valid. Is this an act rational in itself and rationally done? No act can be more rational. As to the form of the paper, nothing can be more correct and regular; every thing shews that it was well considered. On the face of the will, there is nothing to denote that the testator was meditating suicide; on the contrary, he speaks of "what I may bequeath by codicil hereafter," shewing that self-destruction was not in his mind at this time. It is not an inofficious will; the testator being without relations, who would be more likely to have his property than Mr. Chambers, who had been at Oxford with him, and had been called to the bar with him, and Mr. Yatman, an old schoolfellow at Westminster?

The *Queen's Advocate* and *Jenner*, for the Crown. What is the law applicable to such a case? It is true every person must be presumed sane till the contrary be proved, and the burthen of proof is on

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(a) *Cartwright v. Cartwright*, 1 Phill. 90.

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the party impeaching the will. But when it is established that the party deceased was insane at any time, the *onus* shifts, and there must be proof that the act was done at a time when he was sane, or had a lucid interval. What is insanity? Where there is an insane delusion; where a person believes what does not exist. *Dew v. Clark* (a). It is said, that unless partial insanity connects itself with the act in question, it cannot be affected. But this point is considered in *Dew v. Clark*. The distinction in other Courts, as well as this, is, that in civil cases, if there be partial insanity, and no lucid interval proved, the act is invalidated, though the insanity be not directly connected with the act; but in criminal cases, the party is not exempted from responsibility unless the act be directly connected with insanity. The amount of proof of a lucid interval differs with the cause of insanity, being less in cases of fever or drinking. The case of *Cartwright v. Cartwright* is a strong case, but it does not go to this extent, that in all cases a rational act rationally done should have validity. Dr. Shepherd's evidence alone would not establish insanity; but, taken in conjunction with the answers of the executors, the result is, that the testator was labouring under an insane delusion at the time he made the will. He had told Mr. Yatman that the Benchers of the Temple were about to disbar him, on account of a fraud he had practised on his admission, in describing himself as the son of a gentleman, whereas, in fact, he was the son of a chemist. This was a delusion. On the 13th November, he told Mr. Yatman that there was a

(a) Report of the judgment by Dr. Haggard, 1826.

conspiracy against him, which would drive him to self-destruction. On the 14th, Mr. Yatman and the deceased again met, when the latter asked if he had thought of any thing for his relief, saying " Pray do something, or it will have a fatal termination !" On the 15th the will was made, and his death took place on the 16th, when he is found by the coroner's inquest to have been in a state of insanity.

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JUDGMENT.

SIR HERBERT JENNER,

The question in this case is with respect to a paper propounded as the will of Mr. Thomas Thompson, who died 16th November, 1839. The paper is all in the handwriting of the deceased, and purports to have been signed by him in the presence of witnesses, and the names of three witnesses are subscribed to it, as attesting its execution in their presence ; therefore, *primâ facie*, the paper is entitled to the probate of the Court. But this paper in the form of a will, is opposed on behalf of the Crown ; Mr. Thompson having died without any known relations ; if he has not left a will valid in law, the Crown will be entitled to the possession of his property. The grounds of opposition are two ; first, that the paper was not duly executed in the presence of witnesses, as required by the act ; secondly, that the deceased was not of capacity at the time of execution. I will dispose of the first ground briefly, it having been argued as a separate and distinct question in the first instance, when the Court was of opinion, and expressed that opinion the last Court day (and I see no reason to depart from that opinion), that the evidence of Mr Woolfitt, who deposes that the will was exe-

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cuted in the presence of himself and the other attesting witnesses, and that it was attested by them in the presence of the deceased, is entitled to a greater degree of credit than that of the other two witnesses, who might have forgotten the fact at the time they gave their evidence. The great and important question remains behind, namely, the capacity of the deceased.

Before entering upon this question, it may be necessary to advert a little to the circumstances of this gentleman's history.

It appears that he was brought up at Westminster, where he became acquainted with Mr. John Yatman, a schoolfellow, and their friendship continued during the remainder of the deceased's life. It appears that Mr. Yatman was afterwards employed by the deceased as his solicitor. From Westminster, it should seem that he went to University College, Oxford, and there he formed an acquaintance with Mr. Robert Joseph Chambers, with whom he contracted a great intimacy and friendship, which lasted during his life. Both were called to the bar nearly at the same time, though Mr. Thompson does not appear to have practised at the bar, having a very comfortable provision, his personal property amounting to 25,000*l.*, besides freehold and copyhold estates, the value of which is not stated. The deceased lived a very retired life; he was unmarried, and had no known relations. On his death, therefore, the *Queen's Proctor*, under the circumstances, interfered on behalf of the Crown, not simply for the benefit of the Crown, but to preserve the rights of persons who might be entitled to the property of the deceased, if he be dead intestate; so that it was a very proper interference on the part of the Crown.

Now, this gentleman living, as I said, a very retired life, as far as the Court has any information before it, the only person who could give any account of his real state and condition, is the single witness produced, the Rev. Dr. Shepherd, the deceased's college tutor, who appears to have kept up an intimacy and friendship with the deceased from that time till very shortly before his death.

The case set up on the part of the Crown is one of habitual insanity, and it is the first case within the recollection of the Court in which habitual insanity has been attempted to be proved by the testimony of a single witness. It is admitted that, in this case as in others, the presumption of law is in favour of sanity, particularly where the will is in the handwriting of the deceased, and executed in the presence of witnesses; and that it is incumbent on the party alleging the insanity to establish that state of mind; what then is pleaded in this case? (The Court here stated the contents of the Allegation given in against the will, and continued). This is the whole case set up by the Crown, and upon the evidence of one witness examined in support of this Allegation, and the answers of the other parties to it, the Court is called upon to pronounce the will invalid, as made and executed at a time when the deceased was labouring under insanity.

The first point to be considered is this: is habitual insanity proved? Because it is admitted that, where habitual insanity does not exist, the proof of actual insanity at the time must come from those who impeach the act. The Court, therefore, must look for proof of habitual insanity

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or insane delusion from those who oppose this will ; but I cannot find in any part of the evidence, any instance of insanity till the latter end of 1838 or the beginning of 1839 ; I cannot find that Dr. Shepherd states anything of the nature of delusion, as far as his judgment goes, in the conduct of the deceased till that time, or till the spring of 1839. Dr. Shepherd saw him for the last time, ten days before his death. The character he gives of the deceased is this : (The Court here read the evidence of Dr. Shepherd). Now, it is admitted, that, as far as this evidence of Dr. Shepherd goes, it is not sufficient to show habitual insanity ; it carries it back no further than March, 1838, and it must depend upon other evidence to carry the insanity beyond that date. And I must say that, when I see that Mr. Copeland attended the deceased on the 21st October, 1839, it seems very extraordinary that Mr. Copeland should not have been produced as a witness in the cause ; to say, after the statement made by Dr. Shepherd, what his opinion was of the state of the deceased when he saw him. Mr. Copeland could have been able to give the Court more exact and accurate information as to the state of the deceased than Dr. Shepherd.

Dr. Shepherd then, the only witness who is called to prove habitual insanity on the part of the deceased, states that, although he did, at a particular period, entertain an opinion or impression that the deceased was labouring under a delusion, he considered that, in the spring of 1839, it had entirely disappeared, and altogether passed away. The deceased dined with Dr. Shepherd in May, 1839, and conducted himself in a perfectly

rational manner ; and after the spring of 1839, he is not able to speak to anything of the nature of groundless delusion in the mind of the deceased. I cannot say that the evidence of a person so competent to form an opinion as Dr. Shepherd, and who had such opportunities, is not satisfactory to my mind ; that, up to that time at least, the deceased was a person of sound mind, memory, and understanding, except at the particular time when those notions were dwelling in his mind ; I cannot see in the evidence of Dr. Shepherd anything of habitual insanity on the part of the deceased ; though at times owing to the particular state of his bodily health, certain delusions might have been impressed upon his mind, and if he had made the will when under the influence of one of these delusions, the Court might have had a good deal of difficulty in saying that the deceased was of perfectly sound mind, memory, and understanding.

It being admitted that the evidence of Dr. Shepherd is not sufficient to establish insanity, what other evidence is there ? Mr. Chambers and Mr. Yatman are the executors named in the will. Mr. Chambers is residuary legatee and devisee of the real property ; Mr. Yatman has a legacy of 2000*l*. The answers of these gentlemen have been called for to the Allegation, and it is said that they carry the case something further than Dr. Shepherd has done, and that they prove that the deceased did labour under morbid impressions and delusions at the time the will was made and executed. Now, these gentlemen have stated in the most candid manner everything within their knowledge, and as fully and fairly as they could, against

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their own interest. They are, therefore, entitled to have their evidence taken altogether, and not in parts only; where it is against their own interest, they are bound by their admission, but where explanations are offered, the Court will not refuse to hear them, considering the candid manner in which they have met the case. (See the answers, which the Court read.)

Then on the three days, the 12th, 13th, and 14th November, the deceased, it is admitted, was labouring under delusions; the Court has this fact on the admission of the parties, Messrs. Chambers and Yatman; but, according to Mr. Yatman, he succeeded in dispelling those delusions from his mind. But between the 12th November and the spring of 1839, as far as the Court has any information, this gentleman had no such delusions in his mind. All that the answers admit is, that on the 12th November, and two following days, he was labouring under delusions? But there is nothing to lead the Court to presume that they existed on the 9th, 10th, and 11th November. In the absence of evidence, what is to authorize the Court in coming to the conclusion that the deceased was labouring under an insane impression on the 15th November, when the will was executed? There is no reason to suppose that the state of his mind was different on the 15th November from what it was on the 11th. The Court cannot act upon conjecture of what the stages of his delusion might be. What is the Court to do, in order to see whether the act of the deceased is a valid act? It must look to the manner in which the act was done, to satisfy itself whether a lucid interval is established. It cannot

be contended that the delusion was fixed and of long duration ; and if done during a lucid interval, the act will be valid, notwithstanding previous and subsequent insanity. I think it right to notice, that on the 14th November, according to the admission of Mr. Yatman, the deceased intimated that, unless some measure were taken against the supposed intention of the Benchers of the Temple to disbar him, which was a delusion, it might have a fatal termination ; and, perhaps, he might at that time have contemplated an act of self-destruction. But it is also probable that the deceased, knowing he was subject to this delusion, might, as an act of precaution, have meant to dispose of his property by will ; it is quite consistent with probability that it was a measure of precaution, and not in contemplation of an act of self-destruction.

It has been contended in this case, that whatever might have been the state of the deceased's mind, the act itself being a rational act rationally done, is sufficient proof of a lucid interval ; and the case of *Cartwright v. Cartwright*, before Sir William Wynne, has been cited in support of this position. It has been contended, on the other hand, on the authority of Sir John Nicholl, in the case of *Dew v. Clark*, that where an insane delusion exists, there is unsoundness of mind ; and it has been said that *Cartwright v. Cartwright* is always a favourite case, and is paraded when it is contended that a rational act rationally done is entitled to be considered valid. On the other side, it has been observed that *Dew v. Clark* is another favourite case, and is paraded in its turn, when the object is

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to shew that where there is delusion in the mind of an individual there is insanity. Now I cannot but think that these two cases have, to a certain extent, been pressed beyond what they will bear, and I think it not irrelevant to make a few observations upon those cases, before I consider how far their principle applies to the present.

The case of *Cartwright v. Cartwright* was the case of a lady who had been for some time suffering under raving madness; who was in confinement, and whilst there, made a will, which was pronounced for. But I cannot consider that this case establishes the point, that any rational act, done in what appears to be a rational manner, will be considered sufficient to establish a lucid interval. I think the position laid down by the learned judge was with reference to the particular act done in that case, which was one of a very extraordinary nature. It was the case of a lady, possessed of considerable property, who had for different periods of time been afflicted with insanity, accompanied by symptoms of the worst character, and at, and for some time preceding the period when the will was made, was in such a state of mind that her hands were confined, she was tied down and not suffered to have a candle. Being importunate for pen, ink, and paper, which had been withheld from her by direction of the physician, to pacify her, they were by his permission given to her, and her hands being untied, she sat down and wrote the will, which turned out to be the result of her own sole will and pleasure, not being dictated or suggested by any person. The learned judge said: "I think the strongest and best proof that can

arise, as to a lucid interval, is that which arises from the act itself; that I look upon as the thing to be first examined, and if it can be proved and established, that it is a rational act rationally done, the whole case is proved." But Sir William Wynne did not content himself with considering merely whether the act was a rational act; he looked into all the grounds and circumstances, to see how far the act was the result of the deceased's own will and intention, with regard to the claims of her family: to see what was the state of her mind and behaviour at the time (for she had been in a state of actual raving), which was calm and collected, having all her senses about her; and he came to the conclusion, that the act, being so rational in itself and so rationally performed, was sufficient to establish a rational intention and soundness of mind in the party. That Sir William Wynne did not consider every rational act rationally done as sufficient to prove a lucid interval, we may collect from what is stated in a subsequent part of his judgment, in which he refers to cases where testamentary acts of a rational character were set aside. So that it is not every rational act rationally done, which, under all circumstances, is sufficient to constitute a lucid interval: it was the particular manner in which the act was done in that case, which led Sir William Wynne to the conclusion that there was a lucid interval, whatever might have been the state of the deceased before; and it is to prevent that case from being pressed beyond what it deserves, that the Court, agreeing with all that fell from the learned judge, has thought it necessary to make these observations.

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The case of *Dew v. Clark* has been cited, to shew that, wherever delusion exists in the mind of a person, his mind is insane; and that case, I must say, in my opinion, is not always cited fairly; that is, it is cited in detached passages, to shew that where delusion is, insanity exists, in all cases and under all circumstances. But the learned judge has not laid it down that every false imagination which may exist in the mind is an insane delusion, that is, a notion which no sane person would believe, and which can be dispelled by no argument or demonstration; though he did say that where there was a delusion, which was an insane delusion, if it continued and became habitual, existing at all times and without intermission, it would be exceedingly difficult to sustain an act done under such circumstances. But this position was laid down as applicable to the particular chain of circumstances in that case, and in his elaborate judgment, there is a minute survey of every circumstance in the business and mode of life of the deceased, from the day of his marriage, and the birth of his child, to the conclusion of his life, shewing the delusion that existed in his mind, that it was an insane delusion, and that the will was written under the influence of that delusion, with regard to his daughter, appearing immediately on her birth, existing in every stage of his life, and pertinaciously adhered to in spite of all remonstrances. Therefore, I do not consider that the case of *Dew v. Clark* goes to the full extent, that a will under whatever circumstances, must necessarily be invalid, because the deceased might entertain notions which might have no foundation; but the

Court must look to see whether the delusion be an insane delusion, and continued to be an insane delusion, and was so indelibly fixed in the mind of the deceased, that no reasoning, no demonstration, no remonstrance of friends could convince him that it was devoid of foundation.

In the case before the Court, Dr. Shepherd states that the error the deceased took up was entirely effaced from his mind, though he subsequently, according to Mr. Yatman, adopted another, that the Benchers of the Temple were proceeding to disbar him. But supposing this was an insane delusion, how long did it last? For three days the impression remained on his mind, but there is no evidence that it lasted longer, unless the act of self-destruction reflects back on the 15th November; that occurred, I think, in the case of *Macadam v. Walker*. Suppose the deceased laboured under an insane delusion on the 12th, 13th, and 14th November, is the Court to assume the continuance of the disease on the 15th? It is somewhat extraordinary that the case of *Cartwright v. Cartwright*, which is appended as a note to the report of a case which occurred in 1809. *White v. Driver* (a), has been so much relied on, while that case has not been referred to; I cannot, however, but think that the latter case is important. That was the case of a person who had been at times subject to insanity for several years preceding her death, and until four days before the execution of the will which was propounded, and which was pronounced for by the Court.

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Sir John Nicholl, in the course of his judgment, stated that "the deceased had been subject, not only to eccentricities, but to delusion and derangement at different periods for several years, but it was not continuous; she was not under confinement; she managed her own affairs; she came out of the workhouse on the 21st of January, she acted immediately, and continued to act from that moment till her death, as a sane and rational person. There is no indication of any fraud or circumvention in procuring this will, or even in suggesting it to her; a desire to make a will is not with her an insane topic. The deceased herself declares and directs the disposition of her property; the disposition itself is neither insane nor unnatural." And speaking of the execution of the will in that case, the learned judge says, "The Court has the concurrent opinion of these several persons," that is, the witnesses to the execution, "that the deceased was perfectly sane and rational throughout the whole period of the transaction." This is not an unimportant observation with reference to the present case. The circumstances attending the execution of the will in this case are these: The will is in the handwriting of the deceased; it is signed by him, and attested by three witnesses; it is very fairly written, without a mistake from the beginning to the end, and with but one alteration, and that is with respect to the amount of a bequest to a servant, and to that the deceased has affixed his initials, and the signature is made with great care and regularity. On the face of the will itself there is nothing to shew delusion or eccentricity, and I am of opinion that

the disposition is a natural one under the circumstances.

The next thing to be considered, as I am of opinion that it is a rational act, is, was it rationally done? The deceased was a barrister, and, therefore, there was no necessity for him to resort to a professional person to draw up a will for him, and accordingly, he prepares it himself, and takes it to the persons who were to witness it. The witnesses to the will are John Woolfitt, Louisa Lucas, and Charles Ellis. Mr. Woolfitt is an upholsterer, well known in business, and the deceased had employed him to furnish his chambers; and it is proved by Mr. Woolfitt, and by the other persons, that the deceased was in the habit of going to Mr. Woolfitt's shop, though he had more communication with Ellis, the shopman, than with Mr. Woolfitt himself; so that these were persons to whom the deceased would very naturally apply to attest the execution of his will. These three persons have been examined, and the first intimation they had of an intention on the part of the deceased to execute his will, was by a letter, which Ellis says he received from him on the morning of the 15th. It appears from the evidence of Ellis, that he was in the habit of seeing the deceased two or three times a week for some months; Ellis, therefore, is a person likely to know whether, at the time when the will was executed, there were any symptoms about the deceased indicating that he was labouring under any delusion; but he does not give any evidence to that effect. According to his statement, nothing can be more rational than the conduct of the deceased. Having made an ap-

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pointment to call at the shop, he produced a check from his pocket-book for 140*l.*, which he gave to Mr. Woolfitt, on account of his debt, and then he proceeded to the execution of the will, pointing out the alteration he had made, and when the execution was attested, he folded the will up, put it in his pocket-book, and went away. This witness says he was, during the whole time, "cool and collected;" and, although he does depose an interrogatory, that the deceased was hasty, and expected a great deal of deference, and was of an irritable temper, and occasionally used violent language, he says, he was not, at all events, when at Mr. Woolfitt's shop; otherwise than of sound mind, memory, and understanding. According to the other witnesses, Lucas and Woolfitt, nothing could be more cool, collected and rational than the conduct of the deceased on that occasion, there being no appearance of delusion in his mind at that time. If, therefore, between the 12th and the 14th of November, he laboured under an insane delusion, I am satisfied that he was at the time of the executing this will of sound mind, memory, and understanding, enjoying a lucid interval, if it be proper to call it a lucid interval, where habitual insanity has not been proved.

Upon the whole of the case, I am perfectly satisfied in my own mind, that this paper emanated from the deceased, he being at the time of sound mind, memory, and understanding, and free from delusion; his whole conduct in the making and executing of the will proves that he was not at the time labouring under any delusion of mind. If there had been a delusion previously existing, there was a lucid interval, and I have no hesitation in

pronouncing for the validity of the paper, and decreeing probate.

The *Queen's Advocate* asked for the Crown's costs; but the Court refused them.

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GODRICH v. JONES.

Petition.

This was a cause of proving in solemn form the will, with two codicils, of Harriet Lloyd, spinster, promoted by Francis Godrich, as sole executor of the will in question, against Pryce Jones, an executor named in a prior will. The will had been propounded in a *condidit*; a defensive allegation on behalf of Mr. Jones, had been admitted, and a responsive allegation by Mr. Godrich, and witnesses had been examined on all the pleas, though publication had not passed. Mr. Jones now applied for a grant of administration *pendente lite* to the person who had been appointed by the Court of Chancery, receiver of the rents and profits of the deceased's estate, limited for the purpose of appearing as personal representative of the deceased, and of substantiating proceedings in Chancery, in respect to property alleged to have been improperly obtained by Godrich from the deceased, the Court of Chancery not having jurisdiction to clothe a receiver with the power of suing and of protecting the estate against persons who claimed it adversely to the estate of the testatrix.

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The Court will not grant an administration *pendente lite* unless a necessity be shewn for the grant.
Query, whether the Court will grant such an administration, limited to the purpose of investigating the title to property assigned in the lifetime of the deceased.

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The *Queen's Advocate* and *Haggard*, in support of the petition. This application has been made at the suggestion of the Lord Chancellor; the power of a receiver under an order of that Court not being equal to those of an administrator, and this Court grants administration *pendente lite* for the protection of the property. Jones swears that Godrich fraudulently possessed himself of certain property of the deceased shortly before her death, by an agreement which it is proper should be investigated in another Court, and he swears he believes Godrich, if called upon to refund the property so obtained, would prove to be insolvent, or in very embarrassed circumstances.

Addams, against the petition. There is no precedent for such a grant without sufficient proof that the property is in jeopardy. But here there is nothing to shew that the property belongs to the estate of the testatrix.

JUDGMENT.

SIR HERBERT JENNER.

Although this Court, generally speaking, has the power to grant administration *pendente lite*, it has always required that a necessity for such grant should be shewn by proof that the property is in jeopardy. It is stated in *Northey v. Cock* (a) to be the established rule of the Court not to grant administration *pendente lite*, for the purpose of taking property out of the hands of a litigant party, unless

(a) 1 Add. 326.

it be shewn that it is in jeopardy; and that the party in possession of it is incapable of furnishing adequate security; and there are two cases in Sir George Lee's Reports, *Sutton v. Smith*, (a) and *Maskeline and Brohier v. Harrison*, (b) which bear out the position. The questions, therefore, are, first, whether the circumstances of the case, as stated in the affidavits, shew that the property is, at this time in jeopardy, and could be secured by the grant between this time and the hearing of the cause; and secondly, if the circumstances of the case are such as to render it desirable that there should be such a grant of administration, whether this Court has exercised the power of granting administrations with the limitations set forth in the Act on petition. This Court would not take upon itself to decree an administration of this kind, unless there was an absolute, or at least a very pressing, necessity for it; and it lies on the party applying to shew that there exists such a necessity.

The allegation in opposition to the will, pleads, that property of the deceased was obtained improperly from her, and the affidavits in support of this application by Mr. Jones, and Mr. Van Sandau, his solicitor, state that, if Mr. Godrich were called upon to pay the stock and other property belonging to the deceased, of which he hath unduly possessed himself, he would have great difficulty in doing so, which might happen, I apprehend, to many parties if they were called upon to refund all the property in litigation at a moment. Mr. Jones, after de-

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(a) 1 vol. 207.

(b) 2 vol, 258.

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tailing the manner in which the property is alleged to have been obtained from the deceased, states, "that he verily believes that the property, or the greater part, hath been unduly obtained from the deceased, and that it is desirable that the same should be forthwith investigated; and that there is great apprehension for the safety thereof, and that if the said Francis Godrich was required to pay the said stock and other property belonging to the deceased, and of which he hath unduly possessed himself, he is, and would prove to be insolvent, or in very embarrassed circumstances." Now, it appears to me, that this is as loose a statement as can be made as to the danger in which this property is supposed to be placed. Neither Mr. Jones nor Mr. Van Sandau deposes to a belief that Mr. Godrich is in embarrassed circumstances; it is merely Mr. Jones's apprehension, upon what ground does not appear. I never recollect so loose a statement, on which the Court has been called upon to act; nothing as to the party's belief, only his apprehension; he believes that there is a great apprehension, without any ground being stated.

In answer to this statement, what does Mr. Godrich say? For the Court must look, not at the mode in which the property was obtained from the deceased, but at the means which Mr. Godrich has of paying over any property of the deceased in his possession, to the persons to whom she may have disposed of it by her will. He states that "he is absolutely possessed in his own right, of considerable freehold and leasehold property, in various counties, sufficient to maintain him independently of his profession, and that his profession has, for

many years realized to him an income of about 1,500*l.* per annum." Now really this is a complete answer to what is suggested on the other side, as to an "apprehension," that he might prove in embarrassed circumstances. I do not, therefore, think that the property is in such jeopardy as to call upon the Court to take what is admitted to be a novel step, of granting administration *pendente lite*, for the purpose of investigating these claims, and of ascertaining whether or not this is to be considered as the property of the deceased.

But suppose the property were in jeopardy, and the circumstances were such as to call upon the Court to grant administration *pendente lite*, has it ever exercised the power of granting such administration for the purposes sought for here? The limitations for investigating Mr. Godrich's title to the property he claims, as given by the deceased, and to other property obtained by assignment, or by drafts filled up by him, are pretty sweeping limitations. I cannot find any case in which the Court has made, or has been called upon to make, such a grant, where no reasonable ground is assigned to show that the property is in jeopardy, and I must be cautious in making a precedent for such a grant for such a purpose. It was long doubted whether an administrator *pendente lite*, had authority to bring an action of ejectment, or any other action. That point has been determined by the Court of Chancery, and it is now considered that an administrator has such power; but I never heard that an administrator *pendente lite* had the power of commencing actions against persons in possession of property claimed under a will in litigation, and

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An administrator *pendente lite* can bring actions of ejectment
I think means that an administrator *pendente lite* can bring actions against persons in possession of property claimed under a will in litigation

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I am not inclined to make a precedent, and still less in a case where the parties are in a condition to pray publication of the evidence, and the case may be heard before the Court breaks up for the long vacation. I am not prepared to say, that the Court has the power to grant such an administration; though I will not say it has not the power, under peculiar circumstances; but I do not think that, in the present case, the Court is called upon to exercise it. Under these circumstances, I am of opinion that I must reject the petition, and leave the party to bring the cause to a hearing as speedily as circumstances will admit. I cannot see that the actions could be tried, till the whole question as to whose property it is, had been disposed of by this Court.

STEPHENS v. TAPRELL.

Allegation.

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Cancellation of
will is not a
revocation
thereof, under
the words,
"otherwise
destroying" the
same, in the
stat. 1 Vict.
c. 26, s. 20.

This was an Allegation propounding, by direction of the Court, (a) a paper as the will of Mr. Edward Stephens, a solicitor at Bristol, who died 15th of March, 1840, leaving a son and daughter, and personal property to the amount of about 25,000l. The paper in question, which was in the deceased's handwriting, signed by him, and attested by two witnesses, when found, a few days after his death, locked up in his office, was in a cancelled state:

(a) On Motion, April 23rd.

the body of the will was struck through with a pen, the name of the testator was crossed out, the attestation clause, and the names of the witnesses were likewise run through with a pen, and what had been intended for a codicil, but which was not legally executed, was also cancelled with a pen.

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Nicholl, opposed the admission of the Allegation. There can be no doubt that this was the act of the deceased himself, with the intention to revoke the disposition ; and the cancellation is total and entire. In the present Will Act, it was not the intention of the Legislature to impose new and vexatious restrictions upon testamentary acts, but to assimilate the law respecting wills of personal property to that which regulated the devise of real estates, relaxing the law where it was too stringent. In all cases the law is anxious to carry out the intentions of the deceased.

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The 20th section of the present Act provides that the whole will may be revoked by burning, tearing, or otherwise destroying the paper. The next section applies to a partial revocation, contemplating the will as a subsisting disposition. Then the cancellation of an entire will can only be provided for by the 20th section. The 22nd section relates to the revival of a will ; so that the Legislature contemplated a manner of revocation in which the paper would exist in specie : in the case of burning, or tearing, the paper might still exist, and therefore the word "destroying," was not used in the sense of an annihilation of the material.

These clauses were framed upon recommendations contained in the report of the commissioners on real

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property, who proposed that there should be only four modes in which any will can be revoked: "1st, by another inconsistent will or writing, executed in the same manner as the original will; 2nd, by cancellation, or any act of the same nature; 3rd, by the disposition of the property by the testator in his lifetime; and 4th, in the case of a woman, by marriage. By the first and third of these modes, the will may be revoked either entirely or in part; by the second and last, the revocation will be complete."

In the Bill, as originally introduced, the words were, "by burning, cancelling, or tearing," and it might have struck a member of the committee that, by retaining the word, "cancelling," and omitting "obliterating," (both words being included in the Statute of Frauds), without inserting any general term, doubt and uncertainty would be created, and it might be that the word "cancelling" was likewise omitted, and a word added, intended to be of the most general import, denoting the revocation of the entirety of the disposition, and the destruction of the vitality of the will, though not the material upon which it was written. If it was intended to defeat fraud, burning, tearing, or any other act of destruction, not in the presence of witnesses, is not less within the compass of fraud than cancellation; on the contrary, they are less formal and less satisfactory acts of revocation, than the cancellation of an instrument still preserved in the safely locked repositories of the deceased. If burning, tearing, and cancelling had been the only modes of revocation without witnesses, then if a will had been daubed over, or liquid had been thrown upon it, or various

other acts had been done to it, the revocation would have been insufficient; therefore, a general term was employed.

In common parlance, the word "cancelling," is equivalent to "destroying," and this is even supported by learned writers. In *Moore v. De la Torre*, (a) the destruction of the instrument itself is distinguished from a destruction of its effect; and the word "cancellation," was understood as equivalent to "revocation," or "destruction." If this was so under the old law, it must be so now; for if cancelling was understood by a Court of law as a mode of destroying a will, the Legislature must be considered to have adopted that construction, and to have intended "cancelling," as one of the acts included in the words "otherwise destroying." Swinburne (b) interprets "cancelling," to mean, "taking away the force and virtue of a will." *Rumpere testamentum*, was the metaphorical language of the Roman law. (c) Tacitus (d) and Quintilian (e) use the verb *destruo* in the sense of destroying the effect of a thing. The Court has held, (f) that if a party cut out his name with a pair of scissors, it is a destruction within the meaning of the Act: it would have been treated as a mode of cancellation under the old law. Suppose a deceased erased his name with a pen-knife, or washed it out by a chemical preparation; or, suppose the will had been written and attested in pencil, and he had rubbed it out with Indian rubber; would neither act as a revocation? Are all other

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(a) 1 Phill. 375.

(b) On Wills, part vii, s. 16.

(c) Cic. *De Or.* 1. 57.(d) *Hist.* I, c. 6.(e) *De Inst. Or.* 11, c. 1.(f) *Hobbs v. Knight*, vol. 1, p. 768.

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modes of revocation under the old law, recognized by the new, except cancellation? What is self-destruction, in the ordinary sense of the expression? It is not necessary to destroy any part of the body in order to terminate life, and where you destroy the essence, the vitality, the soul of a will, the will itself is destroyed.

Addams, in support of the Allegation. The question is entirely governed by the statute, and the Court is not to adopt a metaphorical interpretation of the words "otherwise destroying," and indulge in speculations as to what would or would not destroy the effect of a will. The intentions of testators are defeated under this Act every day. Suppose a testator, having made a will, at a subsequent period writes under it, "I hereby revoke and annul this will," and signs this in the presence of a witness who attests it, or in the presence of two witnesses not present at the same time; the effect of the will would be destroyed, but, it is no revocation under the statute. When, after mentioning certain specific modes of destruction, the Legislature adds, "or otherwise destroying," it could only mean other modes of destruction *ejusdem generis*, and it must be presumed, that cancelling was intentionally left out. There may be good reasons why drawing a line over a paper should not be considered an act of destruction.

With regard to the 21st section, suppose a testator bequeaths fifty legacies in his will, and obliterates forty-nine, adding in the margin his reasons, affixing his name, in the presence of one witness, or of two witnesses not present at the same

time; notwithstanding all these pains taken to obliterate those parts of his will, if apparent, they must be pronounced for. Where a will is once regularly executed, it can be revoked only in the modes provided in the Act; and there must be a real burning, or real tearing, or a real destruction; the Legislature never could have meant a destruction of the effect of the will.

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JUDGMENT.

SIR HERBERT JENNER.

As this case is to govern other cases, and has been solemnly argued, I have taken time to consider the point, although I did not feel much doubt.

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The first question is, by whose act was the paper, which is a regularly executed will, and would have been entitled to probate in common form, placed in its present condition? And there can be no doubt, it having been found locked up in the deceased's repositories, that the reasonable presumption, and the legal presumption is, that it was done by himself. The next question is, what, under the present law, is the effect of the act? It is admitted, that prior to the first of January, 1838, this would have been a good revocation, for under the old law, cancellation, *animo revocandi*, was a mode of revoking a will. The Act 1 Vict. c. 26, however, has made a very considerable alteration in the testamentary law; by this statute a distinction existing under the former law is removed; wills both of personalty and of land, are required to be executed and revoked in the same manner; the Court has, therefore, no discretion, but must govern itself by

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what it considers to be the true meaning and construction of the act.

In order to arrive at the construction which ought to be put upon the Act, it may be necessary to inquire what the Act has done. In the first place, it has abolished all implied revocations: no alteration of circumstances (with one exception), with respect to the condition of a testator or of a legatee, will amount to an implied revocation. The only alteration of circumstances which is to amount to a revocation of a will duly executed is that of marriage. This alteration of the testamentary law was founded on the fourth report of the commissioners appointed to examine the state of the law with respect to real property, who suggested a great number of improvements of that law, and in their fifth proposition: "With respect to implied revocations, they propose that a will be revoked by burning, cancelling, tearing, or obliterating it, with the intention of revoking it, by the testator, or in his presence, and by his direction:" these being the modes prescribed in the Statute of Frauds. The Legislature, however, in acting upon this report, did not adopt all its suggestions; for, in the first place, the enactment with respect to the revocation of a will by marriage is not founded on the report; and the suggestion, "that no will should be expressly revoked, otherwise than by another inconsistent will or codicil, or some other writing executed and attested in the same manner as shall be required for the validity of a will," they did not adopt wholly; but the 20th section stands thus: "That no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid," that is, by

marriage, "or by another will or codicil, executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed;" so far departing from the suggestion of the commissioners, and from the law as it stood before the statute, as regards "any other inconsistent will;" and the section goes on: "or by the burning, tearing," two of the modes prescribed in the Statute of Frauds, and suggested in the report, omitting the words, "cancelling," and "obliterating," and inserting, "or otherwise destroying the same, by the testator, or by some person in his presence, and by his direction, with the intention of revoking the same."

Then the question comes to this: Is a will *destroyed*, within the meaning of the 20th section, by being struck through with a pen, the name of the testator being crossed out, and the names of the attesting witnesses being struck through? It appears to me quite impossible to put such a construction upon the Act as to say, that cancelling a will, by striking it through with a pen, is a destruction of the will. When the Legislature, after mentioning "burning" a will, and "tearing" a will, speak of "otherwise destroying" a will, they must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the sense metaphorically, as being a destruction of the contents of the will; it never could have been their intention that the cancelling of a will should be a mode of destroying it. And the Court is justified in this conclusion,

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by seeing that cancelling was advisedly omitted, the commissioners having recommended that "cancelling" and "obliterating," as modes of revocation, should stand. The Legislature, however, with this recommendation of the commissioners before them, omit "cancelling" and "obliterating," and insert "otherwise destroying."

It has been suggested by a learned Counsel, who was present when the Bill was in committee in the House of Commons, that the word "cancelling," was advisedly omitted, because the words "otherwise destroying," would include every mode of destruction. But this substitution appears extraordinary, for nothing could have been easier, if it was intended to adopt the recommendation of the commissioners in respect to cancellation, than to have framed the clause thus: "or by burning, cancelling, tearing, or otherwise destroying," which would have left no doubt; whereas, by leaving out the word, they would throw great doubt on the construction of the clause. If it was the intention of the Legislature to have adopted the suggestion of the commissioners, it is extraordinary that they should have left out the very word "cancelling," and substituted other words at least as ambiguous: indeed, to my mind, the term "cancelling," is not by any means so equivocal, to denote a mode of revoking a will, as the words "otherwise destroying." Cancellation may be an equivocal act, but the word itself is not equivocal, and cancellation was a mode of revocation under the old law.

The learned counsel has satisfied me, that the 20th section applies to a total, and not to a partial revocation. But the Court is fortified in its view

of this question by the 21st section, which is founded upon a part of the fifth proposition of the commissioners, who recommend, "that where a will is found with unattested obliterations; it should be considered to be wholly unaltered, except that if any words cannot be read nor made out in evidence, in consequence of the obliteration, the will shall take effect as if such words did not form part of it." Here, again, the Legislature have not adopted the whole of the recommendation; the terms they have used are, "except so far as the words or effect of the will before such alteration shall not be apparent," not adopting the suggestion that the words might be "made out in evidence," and the Court is obliged to reject extrinsic evidence, however strong it may be, as to the contents of the will before the attestation, and to look only to the will itself, and when it finds a word to be utterly illegible, to omit that word as well as the word substituted. Whether the commissioners would have recommended that partial alterations should have this effect, if they had known that the Legislature would have rejected the other part of their recommendation, it is difficult to say; as it stands, there seems some inconsistency. If an alteration be made in a single legacy, by striking it through with a pen, it is of no effect, unless it be attested by witnesses, or, unless the original word be rendered utterly illegible. If the construction contended for be correct, then the Legislature would have said that the whole will might be revoked by a mode more simple than is required for a small part, that where all the legacies were struck out but one, the whole must have effect; whereas, if

1840.

June 6th.

STEPHENS
against
TAPRELL.

*See Brooke v
Kemp, 12 Ad Com
Comm*

See also

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against
TAPRELL.

that one be also struck out, then the whole will is revoked. This never could have been intended; it could not have been the intention of the Legislature that the striking the will through with a pen should be a mode of revocation. "Cancellation," and "revocation," are different terms, though sometimes confounded, cancellation being an equivocal act. It appears to me, that the Legislature, having advisedly omitted cancelling amongst the modes of revocation, and substituted words of more *equivocal* meaning, cannot have intended that striking through with a pen should have been a mode of revocation; and that, if they did consider cancellation to be a mode of revocation, they would have taken care to ^{have} rendered their meaning clear.

Being, therefore, of opinion, that if the facts pleaded in the allegation are proved, the will is entitled to probate, I admit the allegation to proof.

By this it appears that where the signature has been cut out by a knife (Curly 18) that amounts to a revocation of the signature. And with a pen it is not.

HENFREY against HENFREY.

On Petition.

1840.

June 6th.

The testator having left two substantive wills, the latter disposing of the whole of his property, although not

expressly revoking the former will, nor the appointment of executors therein, held to have revoked the former, and to be alone the will of the testator.

Henry Henfrey, formerly of Foundling Terrace, Gray's Inn Road, died at Havre de Grace on the 27th of February, 1839. He left the two following testamentary papers, the one dated the 14th of July, 1838, the other the 26th of February, 1839:

1st. " This is the last will and testament of me, Henry Henfrey, of No. 1, Foundling Terrace, Gray's Inn Road, Middlesex; First: I direct that all my just debts and funeral and testamentary expenses shall be paid and satisfied. And whereas, I am entitled under the settlement made on my marriage with my present wife, Marian, otherwise Mary Ann Henfrey, and in the events therein mentioned, to the reversion of the sum of two thousand pounds, to be paid and invested under the trusts of the said settlement. Now I give and bequeath unto my said wife, Marian, otherwise Mary Ann Henfrey, her executors and administrators, one moiety of the said sum of two thousand pounds so settled and to be paid and invested as aforesaid; And I give and bequeath to my said wife all my plate, linen, china, and household effects, and subject to the payment of all my just debts and funeral and testamentary expenses; I give and bequeath all the rest and residue of the estate and effects to which I am or at any time may be entitled, or which I have or may have power to dispose of by this my will, including all my contingent interest under my late father's will, unto my brother Charles Henfrey, his executors, administrators and assigns. And I appoint my said brother, Charles Henfrey, and my brother-in-law, Charles Marston Stretton, executors of this my will. And I hereby declare my mind and will to be that the said Charles Henfrey, and Charles Marston Stretton, shall not be answerable or accountable for any more monies than they shall actually receive under this my will, nor for any involuntary loss whatsoever. And lastly, I hereby

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revoke and make void all my other wills: in witness whereof, I have, to this my last will and testament, contained in one sheet of paper, set my hand and seal, this fourteenth day of July, one thousand eight hundred and thirty-eight.

“ HENRY HENFREY.

(I.S.)

“ Signed, sealed, published and declared by the above-named testator, as and for his last will and testament in the presence of us who, at his request, in his presence, and in the presence of each other, have subscribed our names as witnesses thereto,

“ JOS^r ELMER,

“ W^r E. QUINTON,

“ Of No. 19, Southampton Buildings, Chancery Lane, Middlesex.”

2nd. “ I here by Leave all I possess in this world to my wife, Mary Ann Henfrey, Containing Household Furniture, Books, &c. I likewise wish to be paid to Miss Diana Maddox, the sum of five pounds, which money was borrowed for my use, this 26 day of February, 1839.

“ HENRY HENFREY.

“ Witness, THOMAS MITCHELL,

“ Witness, ELIZABETH LATHAM.”

On the 8th of November, 1839, letters of admi-

nistration with the latter paper annexed, were granted by this Court to the widow, who was now cited "to bring into and leave in the Registry, the letters of administration so granted, and shew cause why they should not be revoked and declared null and void, &c., and why probate of the two papers as together containing the last will and testament of the deceased should not be granted to the executors therein named."

A proctor having appeared for the widow, and declared that he opposed the first paper, the proctor for Mr. Charles Henfrey, (the party proceeding) was assigned to declare whether he would propound the same; he then brought in an act on petition, in which he alleged the due execution of both papers by the deceased, and "referring to the last will and testament of the said testator, as contained in the two testamentary papers aforesaid," prayed the administration heretofore granted to be declared null and void, and that probate of the two papers might be granted to the executors.

Addams, in support of that prayer, contended that the deceased, when he executed the last paper, did not intend to revoke the former, which was a formally executed instrument, referring to the settlement made on the testator's marriage, appointing executors, and disposing of all the property; that the latter paper was intended as codicillary; that supposing the gift in that instrument to the widow conveyed the whole of the property, which was doubtful, and ought to be left to a Court of Construction, still that the appointment of executors in

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1840. the will was not revoked ; and he cited *Beard v. Beard* (a).

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HENFREY
against
HENFREY.

Haggard and Curteis, contra.

SIR HERBERT JENNER.

This case comes before the Court on petition, in which very little more is stated than appears upon the face of the papers themselves, namely, that the deceased made a will on the 14th of July, 1838, and afterwards made a will disposing of all his property ; now the latter paper, on the face of it, would seem to revoke the former will. I have always understood that the appointment of executors was considered a gift to them of all the testator's property ; here, by the latter paper, all is given to the widow, there was, therefore, no necessity to appoint executors. There is no case in which it has been held that where there are two wills, it is absolutely necessary that there should be a clause expressly revoking the appointment of executors, or that two substantive wills should be admitted to probate.

The latter paper, in my view of it, was executed as a will and not as a codicil, and being so executed, and a perfect instrument disposing of all the property, although there is no express revocation of the former will or of the appointment of executors, it is, *ex necessitate*, a revocation of the former will.

At present I overrule the petition and confirm

(a) 3 Atk. 71.

the administration already granted, and direct it to be delivered out. If the party wishes the question to be brought before the Court in a more formal shape, I shall be glad to hear it.

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June 6th.

HENFREY
against
HENFREY.

ARCHES COURT OF CANTERBURY.

HAWES and VICAT against PELLATT.

This was a suit for subtraction of church-rate, brought by virtue of letters of request from the Commissary of the Bishop of Winchester, for the parts of Surrey within that diocese, by the Churchwardens of the parish of Christ Church, Surrey, against Mr. Pellatt, a parishioner. The defendant appeared to the citation under protest, and contended that he had been wrongfully cited; that it was contrary to the statute 23 Hen. 8, c. 9, that he should be called upon to appear in this Court by letters of request, and that the reason stated for granting the letters of request, namely, that he might have the benefit of employing advocates and proctors, did not apply to him, as he, being a Dissenter, did not intend to employ advocates or proctors, who, being members of the Established Church, would, he conceived, necessarily have a bias against him, and for whose assistance, although unsuccessful, he would have to pay.

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Nov. 12th.

1840.

June 15th.

Causes of church-rate may be removed by letters of request from the Commissary of the Bishop, to the Court of Arches.

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Addams, contra, submitted that there could be no doubt that the letters of request were lawfully issued, and he cited *Ex parte Williams* (a).

SIR HERBERT JENNER.

The question is, whether a suit for subtraction of church-rate, which is undoubtedly of ecclesiastical cognizance, may be brought here by letters of request? It is almost of daily occurrence that questions of ecclesiastical cognizance are so brought, and the practice has been recognized by Courts of Common Law, and I know of no principle of law which distinguishes cases of church-rate from others.

With regard to the reason set forth for issuing the letters of request, it is usual to state that the parties would have the benefit of the assistance of advocates and proctors, which they could not have in the Court below. It may be inconvenient to the defendant to be cited out of his diocese or peculiar jurisdiction, and if unsuccessful, to pay the costs of the party taking out the letters of request; but it is the plaintiff who is under the necessity of resorting to legal advice and assistance, since every act he does must be in accordance with the rules of the Court; if he commit an error in drawing up the citation or libel he may at once fail in his suit; whereas the party cited has less need of assistance, and may conduct his own defence if he chooses to do so, without professional advice.

I am clearly of opinion that the right of the

(a) 4 Barn. & C. 313.

party to proceed in this Court is well founded ; this has been decided in the case cited by *Dr. Addams*, in which Lord Chief Justice Abbott said, “ Taking this offence to have been created by the 5th and 6th of Edward 6th, c. 4, I should think that the authority thereby given to the Ordinary is to be exercised in the same manner as any other authority given to that officer. Now one mode of exercising his authority is by letters of request to the Archbishop or his substitutes. But in *Wenmouth v. Collins*, Lord Holt appears to have been of opinion that the offence of brawling was not created by the statute which has been referred to, and I think that his opinion was correct. If that be so all difficulty is removed, and there can be no doubt that the Court of Arches may derive jurisdiction from letters of request.” It appears that in that case another objection had been taken, namely, that the letters of request ought to have been addressed to the bishop of the diocese and not to the Court of Arches ; that the appeal should have been from the commissary, first to the bishop, and then to the Court of Arches ; but it was held that an appeal from the commissary to the bishop, whose judge he was, would be an appeal *ab eodem ad eundem*, and that the appeal was direct to the Court of Arches. This is a parallel case, and there can be no doubt of the jurisdiction of the Court. I, therefore, overrule the protest, and with costs.

The libel was afterwards brought in ; it was in the usual form, except that it alleged that Mr. Pellatt was assessed in the sum of 1*l.* 19*s.* 2*d.* as

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a rate upon 235*l.*, the rental by composition of premises partly occupied by himself, and the remainder let to third parties; that he had compounded for these premises under the authority of the local act, 51 Geo. 3, c. 32, s. 59, &c.

Mr. Pellatt opposed the admission of the libel; he contended that he had been unduly assessed; that the statute with reference to which the assessment had been made, did not apply to church-rates; and he denied that he had compounded for this rate, although he had formerly entered into a composition; and he prayed the libel to be rejected.

Addams, for the Churchwardens, admitted that the statute did not in terms apply to church-rates, but stated that it had been usual in the parish to include church-rates, and that it was for the benefit of landlords to do so; that as the defendant himself had heretofore compounded, he ought not to be at liberty now to resist the rate; he submitted that it was not necessary to have a fresh agreement for each rate.

1839.

Nov. 12th.

In the libel for subtraction of church-rate, the defendant being wrongly assessed for a small portion of the rate, as landlord, (erroneously under a local statute) the Court allowed the libel to be reformed, holding, that the rate was not bad in toto.

SIR HERBERT JENNER.

In this case, the Court deferred giving its opinion until it had had an opportunity of looking into the act of Parliament referred to in the libel, that act being a local act, and not printed with the Statutes at Large, the Court had no opportunity of seeing.

The first Article of the libel is proper to be admitted.

The second pleads that Mr. Pellatt was, at the time of making the rate, and before, the landlord

of certain houses, and it referred to the Act of Parliament, 51 Geo. 3, c. 32, entitled, "An Act for better assessing and collecting the poor and other rates in the parish of Christchurch, in the county of Surrey, &c.," in order to justify the Churchwardens in having assessed him, and not the occupier of certain premises included in the rate; and the question is, whether Mr. Pellatt is liable to be rated as landlord, or whether the occupiers ought to have been rated? I have looked very attentively at the Act of Parliament, and I do not find that it applies in any way to church-rates, and if church-rates were included in the act, this Court would have no jurisdiction, as a remedy is given by the Act by distress, and there is no reservation of the jurisdiction of this Court. I am of opinion that the second Article is such as not to render Mr. Pellatt liable to pay the sum assessed. It is said that he had up to this time agreed to pay according to the present rate, but I am of opinion that the statute does not in any way bind Mr. Pellatt to be rated in this manner. In the heading of the rate it appears that, except for a small portion of this rate, Mr. Pellatt is liable to be rated for premises in his actual occupation. The Court is not prepared to say that, because an error has been made to a small amount in the sum assessed, therefore, the rate upon the face of this libel is bad *in toto*. I shall, therefore, refer the libel back for reformation, with respect to the second Article.

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The libel was then reformed, (a) and 1*l.* 9*s.* 4*d.*

(a) The assessment charged in the libel originally was for three

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Nov. 12th.

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only claimed as a rate on a rental of 176*l.* 6*s.* 8*d.* on the premises in the actual occupation of Mr. Pellatt. Various proceedings were afterwards had; Mr. Pellatt gave in his answers, which were objected to as insufficient, and further answers were directed to be brought in. He afterwards gave in an Allegation, setting forth various grounds of opposition to the rate, namely, that it was not legally and duly made; that it was excessive; that it was retrospective; that some of the purposes for which it was intended were illegal; that in several instances the owners instead of the occupiers were assessed; that it was unequal; that no demand had been made of him for 1*l.* 9*s.* 4*d.*, the sum now claimed, but that the demand was for the larger sum.

Mr. Pellatt afterwards declared he no longer opposed the rate, and prayed to be dismissed.

Addams, on behalf of the Churchwardens, prayed that Pellatt might be condemned in the costs.

houses in tenements, two glass houses, and two houses and tenements,
at 200*l.* £1 13 4

Also, six houses in tenements 5 10

£1 19 2

When reformed, so much of the former assessment of which Mr. Pellatt was not the occupier, was deducted from the assessment of

£200 0 0

vis. 23 13 4

Leaving £176 6 8

Being, at 2*d.* in the pound, £1 9 4

SIR HERBERT JENNER.

1840.

The only question now before the Court is, whether Mr. Pellatt is to be condemned in the costs occasioned to the parties proceeding against him, he having admitted the amount now demanded of him? The general rule and principle in such cases is, that where Churchwardens are successful, they are entitled to have their costs; but it is contended that this case is an exception to that rule.

June 15th.

HAWES
and
VICAT
against
PELLATT.

In a suit for subtraction of church-rate, the Churchwardens having in the first instance proceeded erroneously, the defendant, who eventually consented to pay the rate, was not condemned in the whole costs, but in *5l. nomine expensarum*.

There is no ground for holding that Mr. Pellatt was not justified in opposing the demand originally made of him, although the difference in amount now demanded was trivial, there being a great principle involved in the question; and had Mr. Pellatt offered no further opposition when the libel was admitted as reformed, the Court would not have condemned him in costs, as in the *Streatham case* (a), and probably they would not have been pressed by the Churchwardens. But Mr. Pellatt was not so satisfied, and in his answers went into a great deal of extraneous matter, which the Court was of opinion he ought not to introduce, and the answers were directed to be amended; he afterwards brought in an Allegation, setting up various grounds of opposition to the rate, which Allegation was opposed, and directed by the Court to be reformed. Mr. Pellatt, however, now withdraws that Allegation, and consents to pay the rate now sued for. There are some circumstances which should induce the Court not to condemn the party in the whole of the costs, for the Churchwardens,

(a) *Blunt and Fuller against Harwood*, vol. 1, p. 648.

1840.

June 16th.

HAWES
and
VICAT
against
PELLATT.

at the commencement of the suit, were clearly in error in applying to church-rates the Act of Parliament regulating the poor and other rates in the parish. I think nothing can be imputed to Mr. Pellatt in opposing the rate, until the libel was reformed, although his resistance afterwards was not justifiable; under all the circumstances then, I am of opinion that I shall best consult the justice of the case by condemning Mr. Pellatt in the sum of five pounds, *nomine expensarum*.

CONSISTORY COURT OF LONDON.

WHITE and JACKSON against BEARD.

1839.

July 27th.
Nov. 8th.

1840.

June 12th.
June 24th.

This was a suit for subtraction of church-rate, by the Churchwardens of Coggeshall, Essex, against William Beard, a parishioner. The libel pleaded the making of the rate (of sixpence in the pound), in vestry, on the 23rd of August, 1838, pursuant to due and legal notice; the occupation by Beard of a house and premises of the annual value of 7*l.* 7*s.* 8*d.*, for or in respect of which he was rightly and equally assessed in the said rate at the sum of three shillings and nine-pence half-penny; that payment had been frequently demanded, &c., and refused, and that defendant had been summoned before the magistrates, and that he denied the legality of the rate, &c.

On behalf of the defendant, an Allegation was given in, pleading,

1839.

June 27th.

WHITE
and
JACKSON
against
BEARD.

1st. That the Churchwardens and parishioners of Coggeshall, in the county of Essex, in vestry assembled, on the 28rd of August, 1838, passed a resolution that a rate of sixpence in the pound should be made for the repairs of the church, &c., but that no rate or assessment was then or at any subsequent vestry made in pursuance thereof. (a)

2nd. That the words and figures following, to wit, "An assessment and rate thereon, &c." (the heading of the rate), appearing in the pretended rate-book, were not written in the said book or any other book until long subsequent to the passing of the said resolution, nor until in or about the month of December, 1838. (a)

3rd. That in November, 1838, Fisher Unwin, one of the parishioners of Coggeshall, in obedience to a summons served upon him, attended by his solicitor, before justices of the peace for the county of Essex, when he was required to pay the aforesaid rate, &c. ; that a certain book was then produced, containing a copy of the said resolution, and the names of several of the parishioners and sums assessed against them respectively, and a confirmation thereof by the arch-deacon, but the said book did not contain any of the words recited in the second Article ; that the said justices heard the complaint of the said Churchwardens against the said Fisher Unwin for the non-payment of the said pretended rate, and also heard the objection of the solicitor on behalf of the said Fisher Unwin that no rate had in fact been made, and the said justices thereupon discharged the summons without making any order upon the said Fisher Unwin. (a)

4th. That the said pretended rate or assessment having been made by the Churchwardens alone, under colour of the aforesaid resolution, but without submitting the same to the parishioners in vestry assembled, and, consequently, without opportunity afforded to the said William Beard or any other of the parishioners to object and to take the opinion of the parishioners in vestry assembled, on his or their respective assessments, or the general equality and fairness of the said pretended rate, the same is invalid in law. (a)

(a) Rejected by the Court.

1839.

Jne 27th.

WHITE
and
JACKSON
against
BEARD.

5th. That the pretended rate or assessment is not a rate or assessment upon all properties in the parish of Coggeshall, or rateable to the said parish of Coggeshall, or upon the inhabitants of the said parish, or rateable thereto ; but on the contrary, the same is partial and unequal, for that the occupiers of houses and lands and the rateable property in Little Coggeshall are altogether omitted in the said pretended rate ; that it appears from and by the book intituled the History and Antiquities of the County of Essex, written by Philip Morant, M. A., and to which book full faith and credit are and ought to be given in Courts of law on matters of public history relating to the said county ; that although Coggeshall is divided into two districts, Great and Little, having separate overseers of the poor, the same is a distinction of recent date, and doth not occur in the royal charters nor in ancient deeds and records ; and that Little Coggeshall may be in a different hundred, and within the peculiar jurisdiction of the Dean of Bocking, at whose visitation a sidesman is annually admitted, but it now forms, and hath ever since the suppression of the Cistercian Abbey of Coggeshall, in the year 1538, formed part and parcel of the parish of Coggeshall ; that in the district of Little Coggeshall, there were formerly a church built by the abbot for himself and the monks, and another for the inhabitants of Little Coggeshall ; but that since the aforesaid suppression of the abbey, such churches have not been maintained, no Churchwardens have been appointed for the district of Little Coggeshall, and the inhabitants of Little Coggeshall hold, possess, and enjoy pews and sittings in the church locally situate in the district of, and which was formerly the parish church of Great Coggeshall alone ; that they attend there for the ceremonies of baptism, marriage, and burial, and they pay small tithes and Easter offerings to the vicar, who officiates in the church situate as aforesaid in Great Coggeshall ; that the rental of the messuages or tenements, lands and premises and rateable property within Little Coggeshall is of the annual value of 3000*l.* or thereabouts, and that by the omission to rate or assess the rateable property and inhabitants of Little Coggeshall, the properties and inhabitants rated and assessed in the said pretended rate are chargeable with the payment of sums of larger amount than they would be liable to pay under a rate duly made.

6th. The sixth pleaded that irrespective of the omission of the inhabitants of little Coggeshall, the rate was partial and unequal, divers persons being omitted to be rated in respect of their properties within Great Coggeshall, &c.

7th. The seventh annexed a list of several persons and properties omitted.

8th. That Beard was summoned to appear before W. H. Pattisson, and other her Majesty's justices of the peace for the county of Essex, on the 12th of March last, and in obedience thereto, appeared before them; that previously to such time, only one demand had been made of him by the said White and Jackson for payment; that the demand was so made of him in or about October, 1838, and before the words pleaded in the second Article, (the heading of the rate) had been inserted in the said book, and, consequently, before the rate had been made, and that no demand having been made of the said Beard for payment of the very rate in respect of which he was so summoned as aforesaid, the proceedings before the said justices were mere nullities, and cannot found the jurisdiction of this Court to entertain the present suit for enforcing payment of a church-rate not exceeding ten pounds from the party proceeded against.

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This Allegation was opposed.

Addams and *Haggard*, for the Churchwardens. It is not denied that a vestry was held on the 21st August, 1838, and that the vestry voted a rate; there was no necessity for a further vestry to be called to make a rate. As to the heading of the rate not being inserted till December, as it is not denied that the rate was made, and for the repair of the Church, this is no objection to the rate; it does not signify if the rate was headed at one time or at another, or if there was no heading at all. The resolution of the vestry, that there shall be a

(a) The Court directed the fifth Article to be reformed, admitted the sixth and seventh, and rejected the eighth, see post, p. 489.

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WHITE
and
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rate, is sufficient; the drawing it out is a matter of subsequent detail. The fifth Article pleads that the rate is unequal, inasmuch as the inhabitants of Little Coggeshall are omitted, and that it appears from Morant's History of the County of Essex, "to which full faith and credit ought to be given by Courts of law," that Great and Little Coggeshall form one parish. It would, however, appear from Morant's book, that they are separate parishes; but if the other party chooses to aver the contrary, the plea must be altered. This species of proof is not legal evidence. (a) That part of the Allegation which pleads that certain persons were omitted in the rate, is the only part of it which is admissible.

The *Queen's Advocate* and *Harding*, in support of the Allegation. One question is, whether a resolution of the vestry, followed up by the Churchwardens, will suffice to make a rate valid; whether the rate should not be made in vestry? According to Degge, (b) the parishioners are not only to *resolve* but to *make* the rate. Burn says the same thing. (c) The practice in all parishes is in conformity with the law as laid down by Degge and Burn. Then as to the heading of the rate; it was not made till December, 1838, though the meeting was in August, and then by the Churchwardens alone. The summons before the magistrates was a mere nullity, for there had been no demand after the rate was made, and, therefore, this Court has

(a) Phillipps, 605—6.

(b) Parsons's Counsellor, part 1, c. 12, p. 202, edition 1820.

(c) Eccl. Law, vol. 1. tit. "Church," p. 378, citing Gibs. 196, and 1 Bac. Abr. 373.

no jurisdiction, the amount sued for being under 10l. With respect to Morant's History, it is submitted that such works are admissible as evidence for particular purposes. Morant's book, we are informed, has been admitted at the Assizes, (fifteen or sixteen years ago) as evidence to prove who was liable for the repair of a bridge.

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JUDGMENT.

DR. LUSHINGTON.

The Allegation now given in begins by stating that, although the vestry passed a resolution that a rate should be made, none was made then, or at any subsequent vestry, in pursuance thereof. I must assume, therefore, that nothing was done by the vestry, except passing a resolution that a rate should be made, and that the rate was made at a subsequent period by the Churchwardens themselves; and I am at present to consider (it being of importance to give my opinion on the questions of law), whether this objection will invalidate the rate.

The parishioners in vestry assembled having passed a resolution that a rate should be made, the fact of the rate itself not being then made, but drawn up subsequently by the Churchwardens alone will not vitiate the rate.

That every church-rate ought, in the first instance to be made by the whole parish, and not by the Churchwardens, it would be difficult to deny. But I am not aware of any authority which says that, supposing a parish should pass a resolution to assess itself in a certain sum, a rate made afterwards by the Churchwardens, in pursuance of such resolution, would be invalid, because it was not submitted to the vestry, and approved. I believe there is no authority for such a position, and I believe that the practice is to pass a resolution, and for the Churchwardens to make a rate in pursuance

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of that resolution. I cannot say that the irregularity, if it be one, is to vitiate the rate altogether; I am not prepared to go to that extent, or to say that the Churchwardens, if there has been a resolution of the vestry, are precluded from collecting a just and equal rate pursuant thereto; for if they take upon themselves to collect a rate after a resolution passed by the vestry, without consulting the vestry, and it should turn out that it was not an equal rate, through the omission of persons liable to be rated, or by assessing one set of parishioners and not another, the rate would be open to any objection on the ground of inequality, and they could not recover it against any parishioner. No injustice could be done, since any parishioner, proving the fact, would be relieved from the rate. If I were to hold this to be an objection, I should invalidate a great many rates in the kingdom. I think, therefore, that the objection in the first Article cannot stand.

A church-rate being passed by a resolution of the vestry, it is no objection to such rate, that the heading was subsequently inserted.

With regard to the next objection, as to the heading of the rate, I think it of no importance in respect to the validity of the rate, as the foundation of the rate was the resolution of the vestry, and if the rate is in other respects fair and equal, it is unimportant whether the heading was inserted at the time it was confirmed or afterwards; for the heading is not of the essence of the rate; it is a mere form, so that this objection cannot avail.

With reference to the third Article, the objection could not stand for another reason. It is merely to show that the heading was not added till December, 1838, and for that purpose; if I had been of opinion that the objection in the second

Article was available. I might have allowed so much to stand, but not the latter part, "that the justices heard the complaint of the Churchwardens against F. U., for the non-payment of the pretended rate, and also heard the objection of the solicitor on behalf of F. U.; that no rate or assessment had in fact been made, and the justices thereupon discharged the summons, without making any order:" for nothing the justices may have said or done could have any effect on my mind.

The fourth Article recapitulates the objections contained in the preceding Articles, and I am of opinion that, if every word was true, it would not invalidate the rate.

The fifth Article contains an objection of a perfectly different kind; the substance of it is, that Great and Little Coggeshall are so far united in law, that the inhabitants of Little Coggeshall ought to be rated for the repairs of the church, and that they are not so rated. It is undoubtedly, competent to the party to put this in plea; for if a number of persons, who ought to be rated, be omitted in the rate, the rate is unequal, and therefore invalid; so that the substance of the Article is not objectionable; but there is the greatest possible objection to the manner in which it is pleaded. The proper form is to plead that the inhabitants of Little Coggeshall have not been assessed to the rate, and to allege the reason why they ought to be rated to the parish church of Coggeshall. And with respect to the admission of Morant's History of Essex, I shall allow the party to plead whatever he thinks proper from this history; but I give no

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The mode of pleading such a fact.

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opinion as to its admissibility as evidence, which can only be determined when I shall have the whole question before me, and can see what particular facts this history is intended to support. County histories may be evidence of some facts and not of others: so I reserve this question till the hearing of the cause, as it would be premature for me now to admit or refuse this evidence.

The sixth and seventh Articles are, no doubt, admissible, for the objection goes directly to invalidate the rate, by alleging that it is partial and unequal, "for that divers persons, who by law ought to have been rated and assessed, in respect of their properties within Great Coggeshall, are not rated."

If a church-rate under 10*l.* be disputed in the Ecclesiastical Court, it is not necessary to plead that the party had been summoned before the magistrates.

I do not think the objection intended to be raised in the eighth Article can by possibility avail. The objection, as I understand it, is this: that the party was summoned and appeared before the magistrates in March, 1839, but that, in fact, the summons was received before the rate legally existed, and, therefore, there was no proper proceeding before the magistrates; consequently, this Court has no jurisdiction, because a summons precedent is requisite to found the jurisdiction of the Court. But this objection is not founded in law, because these Courts have original jurisdiction in matters of church-rate, of which they could have taken cognizance anterior to the 53·Geo. 3, c. 127, which limited the jurisdiction of these Courts in one respect only, that is, in cases where the amount sought to be recovered does not exceed 10*l.*, and where the validity of the rate is not in

question. This very point has been decided in the case of *Ricketts v. Bodenham*, (a) so that if you sue a party in the Ecclesiastical Court, and he denies the validity of the rate, the jurisdiction is founded; but if you sue for 10*l.*, and the party admits the validity of the rate, these Courts have no jurisdiction, unless the plaintiff has resorted to the summary jurisdiction of the magistrates. But here, assuming all the facts to be as they stand in the Allegation, the validity of the rate is denied, and consequently the jurisdiction of the Court is founded. So that this Article must be rejected.

I, therefore, reject the first four Articles, direct the fifth to be reformed, admit the sixth and seventh, and reject the eighth.

The fifth Article having been reformed, (being divided into two) was objected to in its reformed state. It now stood as follows:—

5th. That the pretended rate, &c., is not a rate or assessment upon all properties in the parish of Coggeshall, or rateable to the said parish of Coggeshall, or upon all the inhabitants, &c.; but on the contrary, the same is partial and unequal, for that the occupiers of houses and land in Little Coggeshall are altogether omitted. That Little Coggeshall is appendant to the parish of Great Coggeshall, and the property within the same is subject to and ought to be rated and assessed to the church-rate. That the inhabitants of Little Coggeshall have not any church to uphold or maintain, save only the parish church situate in Great Coggeshall, to which church the inhabitants of Little Coggeshall resort for divine service; that they have, possess, and enjoy many of the principal pews and sittings in the said church, and claim and enjoy all the privileges and im-

(a) 4 Ad. & Ell. 433.

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munities to which the parishioners are entitled, as connected with the sacramental offices and ceremonies of the church for baptism, marriage, and burial; that there are two distinct tables of fees for the interment of the dead within the said parish, *viz.*, one for those who are parishioners, and one for non-parishioners, and the inhabitants of Little Coggeshall at all times claim the right to the interment of their dead as parishioners, and pay only those fees to which parishioners are liable. That they also pay small tithes, or a modus in lieu thereof, and Easter offerings to the vicar officiating in the church of Great Coggeshall. That by such omission to rate or assess the rateable property and inhabitants of Little Coggeshall, the proprietors and inhabitants rated and assessed in the said pretended rate are chargeable with the payment of sums of much larger amount than they would be liable to pay under a rate duly made, for that the rental of the messuages or tenements, land and premises and rateable property within Little Coggeshall is of the annual value of 2042*l.* or thereabouts, and the rental of the messuages, &c. in Great Coggeshall is of the annual value of 8622*l.* or thereabouts.

5th *a.* In part supply of proof of the premises in the preceding Article mentioned, the party proponent craves leave to refer to Morant's History of Essex, to be produced at the hearing of this cause; and the party proponent doth allege and propound the same to be a true and authentic history to which good faith and credit have been given in courts of law, &c.

Addams and *Haggard* objected that the Article in its present state did not aver that Great and Little Coggeshall are one parish.

The *Queen's Advocate* and *Nicholl*, *contra*. We aver that Little Coggeshall is appendant to Great Coggeshall, which means, that it is "part and parcel" of it; that there is no church to maintain but that of Great Coggeshall; that the parishioners of Little Coggeshall resort thereto for all the ser-

vices and sacraments of the church ; that there are two tables of fees in the parish, one for parishioners and one for non-parishioners, and the inhabitants of Little Coggeshall claim to pay the lowest rate, and it appears that they contribute to the payment of the clergyman in tithes (or a modus) and Easter offerings.

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Many facts are pleaded in these Articles which, if true, would go a considerable way towards shewing that Great and Little Coggeshall are one parish ; it is not merely averred that the inhabitants of the latter occupy pews and sittings in the church, but that they pay small tithes (or a modus), to the vicar, and Easter offerings. The objection I entertained to the Article before, was, that I thought Morant's History was too much mixed up in it to enable me to see whether it was evidence or not. As the Article now stands, I do not think it open to objection. But there is another point, suggested by Dr. Nicholl, on which I am not in a condition to give any opinion ; namely, that, in ancient times, prior to Henry the Eighth, these may have been separate parishes, though afterwards united together ; and a question would then arise, whether the church of Little Coggeshall having been 'demolished, the parishioners are to be rated to Great Coggeshall. This question was not raised in the former discussion, and it would be improper in me to give any opinion as to the effect of an ancient union of that kind. As the fifth Article now stands, it pleads a plain and simple fact, that

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part of the parish is omitted in the rate which ought to be assessed, and I am bound to admit it.

With respect to Article 5 *a*, pleading Morant's History of Essex, according to my apprehension, I should have thought that a county history of this description is not evidence to prove any one particular fact, such as to shew that a particular parish paid such tithes, or a modus in lieu, or that a parish paid Easter offerings to the vicar; so far as regards these facts, a county history would not be admissible evidence. But in respect to a matter concerning the whole public, as, for example, at what time or place a particular battle was fought, I always thought a county history was admissible. But Dr. Nicholl has cited the authority of Mr. Baron Alderson, who admitted a county history as evidence of a particular fact, relating to the boundaries of a parish. The case occurred at Nisi Prius, and the writer of the book had no interest in extending the boundaries of the parish. The course I am disposed to take is, to let the Article stand, but to reserve my opinion till the hearing of the cause, whether any part of the history can be received as to any particular fact.

The last point is as to the omissions in the rate, which are said to amount to 290*l.* per annum on a rental of 8620*l.*, and it has been said that this is so immaterial an amount, that the Court would not quash the rate on that ground. I avail myself of the opportunity of stating what my opinion is with regard to this point.

I conceive that if there be omissions in a rate, which seriously and materially affect the interests of the parish at large, by a part of the parishioners

being exempted from a rate which they were liable by law to pay, which is an injury to the rest, the Court is bound to remedy the wrong in the only way in which a remedy can be afforded, namely, if a suit is instituted, the Court will refuse to enforce the rate. But the question is one of degree.

With regard to paupers, if such be omitted, the Court will not consider that the omission invalidates the rate. But is the Court to quash a rate, or refuse to enforce a rate, because there might be omissions amounting to 5*l.*, or 6*l.* or 7*l.* a-year? This Court never laid down such a rule, and never will. There could not be a greater absurdity, there could not be a greater injustice to the people of this country, than to quash a rate, because in a rental of 8000*l.*, or 9000*l.*, or 10,000*l.*, there were omissions of such trivial amount. It would be acting in defiance of the common law maxim, *de minimis non curat lex*, and it would be a doctrine which I never held, and never shall hold till compelled by a superior Court. In this case, is 290*l.* per annum a considerable amount or not? I say it is; it makes a difference of one-twelfth (*a*) to every man in the parish. I am, therefore, of opinion that it would be a material omission.

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In Trinity Term, the cause came on for hearing, on the evidence of two witnesses, and the answers

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(*a*) *i. e.*, A rate of 5½*d.* upon 8910*l.* ($8620 + 290 = 8910$) would produce nearly as much as a rate of 6*d.* upon 8620*l.*; difference ½*d.* = one-twelfth of the rate. But the proportion of 290 to the whole rental is only about one-thirtieth.

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of the Churchwardens, the defendant having abandoned the fifth Article, as to the omission of the inhabitants of Little Coggeshall.

Addams and *Haggard*, for the Churchwardens. The objection to the rate is now confined to the alleged inequality by reason of the omission of certain persons (named in a list), in Great Coggeshall, who are liable to be rated. The annual amount of rateable property in the parish is 8622*l.*, and the amount of the property omitted, as appears from the answers of the Churchwardens, is 65*l.* 11*s.* 6*d.*, belonging to fifty or sixty persons, which will not make one halfpenny difference to Mr. Beard. It has been stated by Sir John Nicholl, (a) with reference to church-rates, that a person intending to object to the assessment ought to attend in the vestry and state his objections in the first instance. Mr. Beard is a vestryman, and the rate was avowedly made on the assessment for the poor. No objection was alleged against the rate, but an adjournment for six months was moved, but negatived, and a rate was carried. Assuming the poor rate as the ground of valuation, has been sanctioned by the Ecclesiastical Court. [Dr. *Lushington*. I do not say that it may not be convenient to do so; but I am not aware that any judge of this Court has said so, except myself. I am of opinion that, if the poor rate contain all the property rateable to the church-rate, there is no reason why it should not be used.] Amongst the items said to be rateable are the

(a) *Lee and Parker v. Chalcraft*, 3 Phill. 647.

poor-house, which is used for the meeting of the guardians, 40*l.* rent being paid for the use of it; and the parochial school.

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The *Queen's Advocate* and *Nicholl*, for the defendant. The real question is, whether there be sufficient *omissa* to invalidate the rate. Of the three kinds, one is, property omitted without any reason at all; the second, property for which the landlords have been rated instead of the occupiers; the third class consists of omissions of persons deemed paupers. The amount of the first kind of *omissa* they make 66*l.*; we make it 152*l.*; they estimate the value of the property much too low. The property rated to the landlords amounts to 133*l.* The omissions in the third class amount only to 16*l.* The total sum is, therefore, 301*l.*

JUDGMENT.

DR. LUSHINGTON.

I have taken time for the consideration of this case, from an anxiety to support the judgment I am about to pronounce, as far as possible by reference to past authorities. I confess, however, that the delay arose rather from this anxiety, than from any great expectation that by such examination as I could make, any important light would be thrown on the subject. It is a great misfortune, with reference to these questions of church-rate—church-rate depending on immemorial usage, and not being governed by act of Parliament,—that the law is not laid down either by elementary writers, or by the decisions of Courts, with such precision as to afford any definite principles to guide my de-

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A church-rate is not invalid by reason of omissions of an inconsiderable amount, it is a question of degree, and in the present case, where the rateable property was 8622*l.*, and property was omitted amounting to 200*l.*, the Court pronounced for the rate, but without costs.

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termination in this case. Church-rate not being so important in point of amount as poor-rate, it has neither attracted the same attention, nor received the same consideration as its sister branch of taxation. One consequence of this is, that this Court has no power whatever to amend a church-rate; and it is placed in this situation, that where a suit is brought against an individual who resists the payment of church-rate, it must either pronounce the rate altogether null and void, and relieve him from the payment of the rate altogether, or it must, on the other hand, pronounce for the validity of the rate.

Now, looking at the authorities on this question, it appears, in a previous case, to have been determined that the Ecclesiastical Court has not jurisdiction in any original proceeding by a rate-payer to set aside a rate on the ground of inequality in the assessment; for the remedy of the party unequally assessed, is to enter a caveat against the confirmation, or to refuse payment of the rate. This is the doctrine laid down in the case of *Watney v. Lambert and Simpson*, (a) by Sir John Nicholl, and the necessary inference from this doctrine is, that it is out of the power of any parishioner to bring a rate under the consideration of this Court, on the ground of erroneous confirmation, and, consequently, the party has no remedy except by resistance to the rate; because, in an objection to the confirmation of a rate, I cannot administer any remedy, since it has been decided, by the same authority, that a rate may be sued for and

(a) 4 Hagg. E. R. 84.

enforced notwithstanding no confirmation has taken place. (a)

The present rate in point of amount is most trifling; the whole sum sued for in the libel is 3s. 9¹/₂d. It is quite clear that, so far as regards the pecuniary interests at stake, it never could be worth the while of any individual to resist the present rate; since, if he succeeded, and received the costs decreed by the Court, the trouble and expense must be infinitely greater than any compensation of this kind which could be awarded by the Court.

Regretting as I do that so long a litigation should have taken place on account of a sum so very small in amount, I cannot consider myself entitled in justice to say, that however small the amount of the rate may be, a party has not a right, if he considers that he has a legal ground of objection, to bring forward a legal defence in this Court, and there may be reasons for resisting the payment of the rate, however small the amount; because it may be, that, by acquiescing in the payment of a small rate, made upon an erroneous principle, a rate of greater amount might be imposed on the parish, and the individual so acquiescing, might be prejudiced thereby; because it has been stated by Sir John Nicholl, that the acquiescence of a parishioner in any particular mode of rating, is to be taken as a *prima facie* proof of the equality, and justness, and fairness of the rate. (b)

I have stated the difficulty which judges experience in these questions, from the absence of any

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(a) *Knight and Littlejohns v. Gloyne*, 3 Add. 53.

(b) *Lambert and Simpson v. Weall*, 4 Hagg. 103.

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distinct authorities with regard to church-rates, and I must say that the examination of all that has taken place heretofore, only augments my difficulty : because if I am to look to any, I must look to all. From Archdeacon Prideaux, I find that the ancient custom of rating was totally different from that of the present day, for the ancient custom was to assess the landlords of estates for their land or stock in the parish, one or the other, but not the whole ; but the present and the proper mode is to assess every parishioner, according to the value of the lands and tenements which he occupies in the parish, without other distinction.

When I look to the provisions of the statute—the only statute which in the slightest degree applies to church-rate, is the 53 Geo. 3, c. 127,—that statute applies merely to the collection of the rate, and has no reference either to the mode in which it should be made, or to any of the principles which should govern any difficulties in the case. I consider that that statute affords me no assistance whatsoever ; because the object of the 7th clause is simply to give a more easy mode of collecting a church-rate, where the validity of the rate is not disputed, and it is somewhat singular, looking at that statute, which is entitled “An Act for the better regulation of Ecclesiastical Courts in England, and for the more easy recovery of Church-rates and Tithes,” that the 7th section, after enacting that “if any one duly rated to a church-rate or chapel-rate, the validity whereof has not been questioned in any Ecclesiastical Court, shall refuse or neglect to pay the same sum at which he is rated,” the justices may direct the payment, if under 10ℓ.,

contains this proviso: "that nothing herein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts, to hear and determine causes touching the validity of any church-rate or chapel-rate, or from proceeding to enforce the payment of such rate, if the same shall exceed the sum of 10*l.*, from the party proceeded against." If the validity of the rate be questioned, under this proviso, these Courts are entitled to entertain jurisdiction to determine the validity of the rate; but it gives the party a right of appeal from the justices to the Quarter Session; but I confess, when I look at the clause altogether, I have great difficulty to understand on what ground there could be an appeal at all.

I mention these circumstances, to show how entirely these questions have been left by the Legislature to be decided by the Court, without any assistance to guide its determination.

What are the principles upon which church-rates must necessarily stand? The first and leading principle I apprehend to be this: that the rate shall be just and equal. This was stated by Sir William Wynne, in the case of *Thompson and Sandford v. Cooper*, (a) as "a truism," he uses this expression: "The first Article pleads, generally, that the rate is unequally made; this is a truism; it must be equally made—no law is required—reason shows that it must be so." The learned judge then goes on to deal with the objections to the rate, on questions of fact, on the ground that if found to be unequal, the rate itself cannot be

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supported. And I observe also, that in the judgment of Sir John Nicholl, in the case of *Lambert and Simpson v. Weall*, (a) is this expression: "The sole object here, is to obtain payment of a church-rate; that is opposed, on the ground of inequality, and the defendant has selected two persons, who are under-rated as compared with his assessment: two instances for this purpose, are as good as two hundred, and the real *gist* of the case depends on the true valuation of those three houses, and that must be proved by the valuation of competent persons." Now, undoubtedly, the expression used by Sir John Nicholl, is a very strong expression. The principle, therefore, being clear, the question I am to look at is this: whether the facts and circumstances of the case altogether, do make this an unequal rate. The meaning of "unequal rate" is this: that some party or other has a right to complain that, under the rate, the payment of which is demanded of him, he is made to pay more than he ought to pay under a just assessment. And an assessment may be unequal in divers ways; where a party who ought to be rated is omitted, of necessity it is an unequal rate; and where a party is rated at less than a fair valuation, compared with other parties, it is abundantly clear that every other rate-payer is called upon to pay more than his just quota. The principle is clear, but the carrying it into practice is abundantly difficult; because I apprehend that there is scarcely a parish in the United Kingdom in which it would not be perfectly easy to overturn any church-rate if the Court were to

(a) 4 Hagg. E. R. 91—100.

decide against the validity of a rate in consequence of the omission of some one or two or three names.

Again, no church-rate could stand a scrutiny on the ground of inequality, if the value of each of the premises assessed were to be examined with a nice and careful scrutiny; there would be always a difference of opinion, as in the case I cited, as to the particular value of each tenement, and as to whether one property or another was taken at too high or too low a calculation. It would be absurd to say that the doctrine, though true in itself, should be pushed to such an extremity: no rate in the country could stand at all. I apprehend there must be some bound and limit, and the only limit which can possibly be prescribed, is the exercise of a just and fair discretion on the part of the Court, to relieve persons from the pressure of actual injustice; I am well aware it may be said that there cannot be a more dangerous principle than that of leaving to the Court so large a latitude of judgment; that it might tend to throw the matter into a state of doubt and uncertainty; that one judge might be of opinion that certain omissions or errors would not overturn a rate, whilst another might consider the *quantum* of error sufficient for that purpose. But all such objections are vain; for on many questions, which are not provided for, it is agreeably to the law of the land that every judge should be allowed to exercise his judgment, and according to the best of his skill and ability, administer justice with discretion.

In cases of this nature, it has always been a rule for the Court to see that no large sum be included

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in the rate which shall not be necessary for the legal expenses of the Churchwardens, or for the decent performance of divine service. See what would be the consequence if the Court had no jurisdiction in such a case as this. The consequence of having the hands of the Court estopped by a rule of this kind, that a rate having been made by a majority of the vestry, whatever its amount, it was unquestionable, would be, that the majority of a vestry would have the power to tax the parish without any possible restriction or limitation, and the money so raised might be applied to illegal purposes, without, as the law stands, any remedy at all; and it is laid down by those whose duty it is to decide these questions, that it is the bounden duty of this Court to exercise its jurisdiction upon the principles I have stated, applied to the facts of each case; for so the law must be administered until it be changed.

Now I collect from past authorities, that the principle which has governed these Courts, when objections have been made to the validity of church-rates, is the following—I use the words of Sir John Nicholl (a): “In suits where the rate is objected to on the ground of inequality, the burthen of proof lies upon the rate-payer who resists; he must prove, and satisfactorily prove, the inequality; if the matter be left doubtful, he fails in his defence.”

Having stated, as clearly as I could, the principle which must govern my judgment, it is now my duty to advert to the facts of the case, and to consider what ought to be, on a fair examination of those facts, the judgment I should pronounce.

(a) *Lambert and Simpson v. Weall*, 4 Hagg. E. R. 103.

The objections to the rate are threefold, as I understand ; in the first place, it is objected, that certain property has been wholly omitted ; in the second place, it is objected, that landlords have been rated instead of tenants ; thirdly, that persons said to be paupers are omitted. With regard to omissions, I may observe, that if property which ought to be rated be omitted, of necessity the rate becomes unequal—that conclusion necessarily follows from the premises. But it does not, therefore, follow, that, because property which ought to be rated has been omitted, any very great hardship is inflicted upon any individual, because the omissions may be so trifling, that it would be scarcely possible to calculate the fractional part of any coin that would represent the damage done to an individual. Again, on the other hand, there may be omissions which might not invalidate the rate, for I apprehend that the opinion of this Court, that the omission of paupers in the assessment, would not necessarily invalidate a church-rate, was supported by the Judicial Committee of the Privy Council, in the *Kensington* case. (a) That case, as is well known, travelled to the Court of Arches, the learned judge of which Court was of opinion that the allegation ought to have been admitted, but more particularly for the purpose of considering a totally different question, whether the rate was so far retrospective as to be null and void. But when the case came before the Judicial Committee, their lordships were of opinion that the objection, on the ground of

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(a) *Chesterton and Hutchins v. Farlar*, vol. 1, 345, 367, 371, and 2 Moore's P. C. Cases, 330.

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retrospection was fatal, though as to the omission of paupers, they concurred in the opinion of this Court, and had the rate not been illegal on the ground of retrospection, deemed the omissions not *per se* fatal, but matter for explanation, and if such explanation were satisfactory, the rate, so far as that objection was concerned, might have been upheld.

The next point is, the omission of occupiers—because, after all, this must come under the head of *omissa*, if at all—the landlords being rated instead of their tenants; and it is undoubtedly a great error. It has been urged that the Court is bound to take the rate as made at the time, and without reference to subsequent payments. This is true in one sense of the word; a rate must be valid or invalid at the time, and a payment made afterwards cannot affect the question. It is obvious, that, if the Churchwardens had not adopted a proper mode of assessment, they could not, in case of resistance, enforce the rate. Every parishioner ought to be so assessed, that the rate could be enforced if it were refused; and although some landlords might think it fair and equitable to pay the rate, yet others might be of a different opinion, and, in case of dispute, it would be impossible to enforce the rate.

The last head is that of total omissions. Now, with regard to property totally omitted, here, again, I am of opinion that the Court must look to the quantum, and I have no hesitation in saying, that the property which has been omitted in this case is what has excited the greatest anxiety in the mind of the Court. It is stated in the answers that of

landlords assessed, the amount is 132*l.*; that 66*l.* is the amount of persons omitted, and paupers 16*l.*

Now, the property I more particularly allude to is the Gas Works; because that property appears to have been erected (the buildings) at a considerable cost, and now it is stated that they are to be valued at a very small sum. I very greatly doubt, if the erections cost not less than 2000*l.*, whether this property could be considered as trivial or immaterial in amount. Again, with reference to the premises occupied by the guardians of the Union, it is clear that, so far as relates to the part of the house which did not belong to the parish in which the church-rate was made, there was no real pre-
tence in law, at the time when it was made, for excluding the whole of the premises from the church-rates. These points have pressed me. I discard altogether the paupers. With regard to the general omissions, I am of opinion, a grave error has been committed by the Churchwardens, and now I am to see whether, under all the circumstances, the amount omitted is so great that I am bound to pronounce the rate null and void, and to dismiss the party from the suit.

It appears that the value of the rateable property in the parish is 8622*l.* What is precisely the value of the property omitted to be rated, I confess I have great difficulty in ascertaining, though it is the real *gist* of the case. According to the Churchwardens, the property omitted, exclusive of paupers, is 50*l.* a-year; the property for which landlords are rated, instead of tenants, is 133*l.* a-year; making 183*l.*

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The Queen's Advocate.—According to Mr. Beard's account, the property totally omitted, and the property rated to landlords amount to 285*l*.

The Court.—Shall we take it at 200*l*.

The Queen's Advocate.—Yes.

Dr. Haggard.—The difference to the defendant would be about a halfpenny.

The Court.—Then the question is, whether the errors committed in this case are sufficiently great to induce the Court to pronounce against the validity of the rate. That errors have been committed with regard to this rate, I have no hesitation in saying, because the whole of the property which is rateable (exclusive of paupers) has not been rated, and because, if the position laid down by Sir John Nicholl be true in point of principle (and I have no hesitation in saying that it is), if there is any property omitted to be rated, which is rateable, two instances are as good as two hundred, for the omission must produce the effect of inequality. I think, therefore, that the Churchwardens have committed errors; but, at the same time, unless I can see that the errors very materially affect the interest of the rest of the parishioners, I should with the deepest reluctance find myself compelled to overturn a church-rate; because church-rates, by the law as it exists are fully established, and I am of opinion that it would ill become any Court to invalidate a church-rate not substantially unjust

and unequal, by taking advantage of small and minute circumstances. Now, from a fair calculation with regard to the omissions in this rate, I do not think that the pecuniary difference is so great as to justify the Court in saying that the party has suffered any loss or damage by the omissions.

There is a case which occurred in the Court of King's Bench, (a) in which an attempt was made to invalidate a church-rate made in part for improper purposes, and the Court of King's Bench—the objection being that the rate was in part made for the subsistence of one or two prisoners in the King's Bench and Marshalsea prisons, there being no allowance by law at the time for such prisoners,—was of opinion that the amount was not sufficient to justify the Court in pronouncing the rate invalid; thereby adopting the principle, that where the parishioners had not been actually aggrieved in consequence of the introduction of an improper item, under the circumstances, it was the duty of the Court to abstain from quashing the rate. Although that case, I admit, does not directly govern the present case (for I do not deceive myself by regarding it as a direct authority), the principle is, in my opinion, a just and equitable one to be adopted in this case; and considering the practice in this parish of rating according to the poor-rate assessment, a practice which, so far as regards the assessment itself, may be perfectly correct and right, because I am not aware of any distinction at present between the assessments for the poor-rate and the church-rate, except that property belonging to the church is not asses-

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(a) *Watkins v. Seaman and Webb*, 2 Lut. 1019, 1023, and Com. Dig. tit. "Prohibition."

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sable to the church-rate ; I say the principle I have mentioned is common and applicable to both.

Upon the whole, then, the conclusion to which I have come, though I confess not altogether without doubt, is, that the errors are not sufficient in amount to induce me to pronounce the rate invalid.

But with respect to the costs, I think there is every reason why I ought not to condemn the defendant in the costs. In the first place, it is admitted that there have been irregularities in this case, which I think are of a serious description. In the second place, I am of opinion, that a parishioner, so circumstanced as the defendant, if he chooses to resist the rate, is entitled to have the fullest and most complete information from the answers of the Churchwardens. He ought not to be left to prove his case by witnesses ; but it is their duty in their answers, to set forth the whole of the facts and circumstances of the case. Where that is done, the Court may be able, (except in particular cases) to pronounce its judgment without the examination of witnesses ; yet these gentlemen thought proper, in their answers, to depose in general terms, instead of replying to each specific averment and allegation.

Looking, therefore, at all the circumstances, and to another circumstance stated by the *Queen's Advocate*, that this gentleman may be rated for other property, and that by possibility a rate may be made as to that property of a much larger amount, which might in some degree affect his pecuniary interests, whereby the rate might incur the peril of being quashed ; looking, I say, at all the facts and circumstances, I think I shall do the best justice I can in this case by pronouncing for

the validity of the rate, and at the same time giving no costs whatever.

As my judgment will undoubtedly (according to the present feeling of the times) become a subject of public discussion, I wish to impress upon the minds of all Churchwardens the necessity, in the present state of the law, of making a church-rate with the utmost regard to accuracy, by adhering to the rule, that every occupier of premises must be assessed, and that the attempt to mix up practices which obtain in poor-rate with church-rate cannot be maintained on the strict principles of law; and I hope that, by attention to this in future, and by a due consideration of the difficulties with which this case has been environed, the Court will be relieved from the painful necessity of having again to adjudicate on the sum of three shillings and nine-pence halfpenny.

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PREROGATIVE COURT OF CANTERBURY.

MACKENZIE *against* YEO.

On Petition.

This was a suit respecting a codicil to the will of Mr. George A. Barber, in which a legacy of 5000*l.* was given to Ann Melton, spinster, (now Ann Mackenzie), which codicil was attested by Thomas Dyke Mackenzie, who had since married

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An attesting witness to a codicil, having married a legatee therein, such legatee propounding the codicil,

held incompetent as a witness in support of it; and having joined his wife in the proxy in the suit the Court directed his answers to be given to an Allegation on the other side, as a party in the cause.

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the legatee. He had been examined (under protest) in support of the codicil, which (on the refusal of the executors to take probate of it) had been propounded by his wife. His answers were now called for to a responsive Allegation as a party in the cause. An act on petition was given in, the object of which was to destroy his competency, on the ground of interest, as being liable to the costs of the suit ; secondly, to shew that he was himself a party to the suit.

The *Queen's Advocate* and *Addams*, in support of the witnesses' competency. The case of *Brograve v. Winder*, (a) in Chancery, 1795, is directly in point ; in which Lord Loughborough held, that a witness not interested at the time of the execution of the will, though interested at the time of examination, was competent. Then, as to Mr. Mackenzie being a party in the cause, he is only incidentally a party ; his wife is the party. On what ground is a party in the cause precluded from giving evidence in that cause ? Solely on the ground of interest, not on the abstract proposition of his being a party in the suit merely ; (b) and if not interested at the time of the execution of the codicil, his becoming so afterwards will not disqualify him, under the authority of Lord Loughborough. He is a subscribed witness, and the evidence of a subscribed witness, whether interested or not, is never dispensed with. There is a case now proceeding, (*Baker v. Archer*) where an attesting witness, who had married a legatee, has

(a) 2 Ves. 636.

(b) Phillipps & Amos, p. 47 ; *Worrall v. Jones*, 7 Bing. 398.

been examined and cross-examined. In *Croft v. Day*, (a) Mr. Claggett, the husband of a party cited to see proceedings—though not absolutely a party to the suit—was examined and cross-examined, and upon his evidence the codicil he subscribed was set aside.

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Haggard and *Nicholl*, *contrà*. A paper has been propounded as a codicil, in which Mrs. Mackenzie and her husband have an interest. He, jointly with her, signs a proxy, and is a party to the suit, and in case of condemnation, would be liable to the costs. In *Baker v. Archer*, the legatee whom the witness married was not a party in the cause, and it remains to be seen whether his evidence is admissible. The case in *Vesey* is a blind case; we have no means of knowing the circumstances, and the doctrine of the Court of Chancery is, that a party shall not, by fraudulently obtaining an interest, disqualify himself. The cases are clear to shew that a witness becoming interested after attesting a deed or bond is not competent, especially where he obtains his interest through the very act of the party who wishes to avail himself of his evidence. As to the case of *Croft v. Day*, Mr. Dufaur asked Mr. Claggett to attest the codicil, and then wished to repudiate his evidence, which he was not permitted to do, and Mr. Claggett was examined. The case of *Buckley v. Smith*, (b) in 1799, is at variance with the decision of Lord Loughborough. See also *Hovill v. Stephenson*, (c) and *Goss v. Tracy* (d).

(a) Vol. 1, 846, n.

(b) 2 Esp. 697.

(c) 5 Bing. 493.

(d) 1 Peere Wms. 289.

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JUDGMENT.

SIR HERBERT JENNER.

The question is, whether the Court is at liberty to call for the answers of Mr. Thomas Dyke Mackenzie, in a cause in which his wife is a party, setting up a codicil in which a legacy of 5,000*l.*, is left to her by the deceased in the cause, of which codicil the executors of the will refuse to take probate. The husband has joined in a proxy with her, and the legacy is not left to the wife's sole and separate use, and the husband will be entitled in right of his wife to the legacy, if the Court shall pronounce for the codicil. The husband, therefore, has a direct interest in the cause, not only in respect to the costs, but also in the subject matter in litigation between the parties, and it is new to me that, because, a person at the execution of a will had not an interest, when he has voluntarily placed himself in a situation where he acquired an interest, he shall be a competent witness. If he were a necessary witness to prove the will, that would be a different state of things; but he is not so. The Act says, that a will shall not be invalid on account of the incompetency of an attesting witness; but this does not make it necessary that he should be examined. I am clearly of opinion, that, according to all the rules, Mr. Mackenzie is not only an interested person, but a party in the cause; and, without reference to cases decided elsewhere, in which the evidence of the witness might be absolutely necessary, as the interest came to him not by his own act but by the operation of law, there being nothing of the kind here, for the party has voluntarily placed himself in this position, and rendered himself

liable for costs ; I am of opinion, that he is in this Court an incompetent witness, and, as a party in the cause, is liable to be called upon for his answers. It is unnecessary to advert to the principles which would apply to the individual as a party in the cause, as a witness, or as both ; it is sufficient to state that he was interested at the institution of the suit, and at the time of examination ; that he has joined in the proxy, and will be liable for costs ; in one respect, he is disqualified as a witness, and in another, he is liable to give in his answers.

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ALLEN *against* McPHERSON.

This was a cause of proving the ninth and last codicil to the will of — Allen, deceased, the will and eight codicils were not opposed.

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At the hearing of the cause,

Harding, on behalf of the party who opposed the codicil, objected to the competency of John Dingwall, as a witness in support of it, upon his answer to an interrogatory which had been addressed to him. His answer was, "I am the solicitor in this cause on behalf of the producents. I instructed Mr. Orme, their proctor, to appear in the suit. I believe the producents were unacquainted with him previous to my taking them to the office of himself and partner to prove the will and codicils of the deceased. The probate was not sent to me, nor did I pay the proctor's bill of expenses. I am a client generally in matters of business, of the firm

An objection to the competency of a solicitor as a witness in support of a codicil, he having admitted that in the first instance he retained the proctor in the cause for the parties who propounded the codicil, but who did not admit that he was responsible for the costs, over-ruled.

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of Messrs. Denne and Orme, the proctors aforesaid. I did first retain or employ them in this cause. I do not know whether I am liable to them or not for the payment of their bill of costs for conducting this cause. I really do not know what the usage in such cases is. The fact is, that knowing my clients in this matter to be responsible men, I have never thought about my liability to the proctors' costs. If, under similar circumstances, the usage is, that solicitors are responsible to the proctors, I am to them." He submitted that this case was precisely the same as that of *Handley and Jones v. Edwards*, (a) and that under the authority of that case, Mr. Dingwall was incompetent to be examined as a witness.

Addams and Nicholl, contra.

The case of *Handley and Jones* against *Edwards*, is a single decision, and is under appeal, it is not, therefore, of binding authority as a precedent: but this case is distinguishable from that, as there Mr. Parkes, the witness, objected to his admitted liability; here, it does not appear that Mr. Dingwall is responsible for the costs, he merely admits that he retained the proctor for his clients, in the first instance, and it does not appear that he is therefore liable for the costs of the suit.

SIR HERBET JENNER.

Whatever doubts may be entertained of the correctness of the decision in *Handley and Jones*

(a) Vol. 1. 722.

against *Edwards*, the Court will adhere to the doctrine there laid down, unless the Court of Appeal should determine otherwise. But the question is, are the circumstances here the same as in that case? There Mr. Parkes admitted his responsibility, but, in this case, the question arises, whether a legal responsibility attaches to Mr. Dingwall by what he has done; he admits that he did first retain the proctors in the cause, but he says he does not know that such retainer makes him responsible, for knowing the responsibility of his clients, he never thought about his liability. The first question then is, whether a solicitor by retaining a proctor becomes thereby legally responsible for all the costs? No case has been mentioned in which there has been such a decision; that the mere circumstance of a solicitor retaining a proctor for his party, makes such solicitor responsible for the costs of the suit. Had the witness admitted his liability, as in *Handley and Jones* against *Edwards*, the Court would have held him to be incompetent, but, as the answer to the interrogatory stands, it is not established satisfactorily to my mind that Mr. Dingwall is responsible for the costs, and therefore an incompetent witness.

I shall overrule the objection, and admit the evidence of the witness, subject however, to any observations that may be made upon it.

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CONSISTORY COURT OF LONDON.

The Office of the Judge promoted by
WOODS against WOODS.

1840.

July 18th.

This was a criminal proceeding instituted by James Woods against his brother, George Woods, for incest, in having intermarried with Mary Ann Spratt, the daughter of Caroline Spratt, his own sister, on the 24th March, 1839.

Addams, on the part of the promoter, moved the Court to direct the defendant to give security for costs, upon an affidavit, stating that he was selling off his effects, with the intention of withdrawing from the jurisdiction. The application was founded upon the order of Court, (13th February, 1830 (a) "That, in all cases, the Court may, upon application made to it, direct security for costs to be given by either or all of the parties."

Haggard, on the part of the defendant, opposed the application.

The Court will not, in a criminal suit, direct the defendant to give security for costs.

The *Court* rejected the motion, as not within the spirit and intention of the Order of Court, though within its general terms. This was the first instance of a defendant in a criminal suit being

(a) Printed at the commencement of 2 Hagg. E. R.

required to give security for costs ; and the effect of granting the application would be, to compel an accused person to aid in his own prosecution, and facilitate his own punishment, which is contrary to the principles of British justice. In other Courts, a defendant sued for a penalty is not required to give security for costs. If the motion were granted and the defendant refused to comply, he must be pronounced in contempt ; but no individual could be held in contempt for refusing to give security for the costs of his own prosecutor.

At the hearing of the cause,

Haggard, for the party proceeded against, objected to the evidence which had been taken in the diocese of Norwich. 1840.
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1st. That the requisition issued in the case was altogether a nullity, by reason of its being wrongly dated ; that it ought to have been dated on the day on which it was decreed ; but in fact it bore date subsequently, that is, when it was extracted.

2ndly. That the commission under which the evidence had been taken was granted without any legal authority, it being stated to have been granted by the official principal of the bishop, who would be the proper officer to direct such an instrument to issue, but that the requisition (under the authority of which the commission would have its validity) was directed to the bishop or his vicar general, commissary, surrogate, or other competent judge, without naming the official principal, who is a different officer from the vicar general, although in this instance it may happen that the same person holds both offices.

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3rdly. That the seven last witnesses, under the commission, were described as having been examined "on the aforesaid Articles given by F. Clarkson," when in point of fact there were no such Articles, F. Clarkson being the proctor of the defendant, and the Articles being those of Rothery, the proctor of the promoter.

DR. LUSHINGTON.

July 18th.

 The Court pronounced the Articles in a suit for incest against a man for marrying his niece, to be proved, and declared the marriage null and void, but dispensed with penance.

 Oral evidence alone in this case sufficient, without proof of the entries in the marriage register.

 Objections to the evidence taken in the case in part sustained.

The facts of this case are most simple, and there exists no doubt whatever as to the law; but unfortunately, through irregularity, objections have arisen, and difficulties are to be overcome, which the Court has greatly to lament.

The pedigree is pleaded as follows: It begins with the marriage of John Woods with Lucy Ray, on the 29th of May, 1788, and the marriage certificate is exhibited; whether this certificate is proved or not, will appear hereafter. It is next pleaded that the parties so married had several children, and amongst others, a daughter, Caroline, born in September, 1789, and also a son, George Woods, born in May, 1802, the party proceeded against in this cause; and there are exhibited two baptismal certificates, as certificates of the baptism of Caroline and George Woods. The Articles next plead the marriage of Caroline Woods to John Spratt, on the 23rd of October, 1809, at Shottisham, Norfolk, and a paper is exhibited, purporting to be a certificate of their marriage. It is next pleaded that John and Caroline Spratt had issue a daughter, Marianne, born in June, 1816, and there is a paper purporting to be a certificate of her baptism. It is next pleaded that George

Woods married this Marianne Spratt, (who, according to the plea, was his own sister's daughter), in March, 1839, at Norwich, and there is an exhibit purporting to be their marriage certificate.

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The evidence upon these Articles has been taken partly in London, and partly in Norfolk, and the persons examined are those most competent to give evidence as to the facts and circumstances. The witnesses are, Lydia Cox, sister of Lucy Ray; William Woods, brother of John Woods, who married Lucy Ray, and who is uncle of the party proceeded against; Caroline Spratt herself, the mother of the person with whom the incestuous marriage was contracted; Caroline Alpe, the sister of Marianne Spratt; Charles Ray Woods, brother of James Woods, the prosecutor; Emma Spratt, another sister of Marianne; and William Alpe, who married Caroline, the sister of Marianne Spratt. The effect of their evidence is this: Lydia Cox deposes to the marriage of her sister, Lucy Ray, to John Woods; she states that she was living in the house, but was not present at the marriage; and it will appear that the certificate is not proved to have been collated with the register; but she proves the cohabitation of the parties as husband and wife; and as to the identity of the parties, I ought to observe, there is not a shadow of doubt; it would be a waste of time to go through the facts upon this point, which is not questioned. William Woods proves the marriage of his brother John to Lucy Ray, by reputation, and the birth of children, and amongst those children, that of his nephew George Woods, the party proceeded against, and a daughter, Caroline. The next witness, Caroline

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Spratt, speaks to George Woods being her own brother; she proves her own marriage to John Spratt, the birth of her own daughter, Marianne, in June, 1816, and that George Woods has acknowledged the connexion between them. Caroline Alpe also proves that her sister Marianne went to Norwich with George Woods to be married, and their living together in the same house at Whitechapel, so that she also proves their cohabitation. Charles Ray Woods deposes to his uncle, George Woods, having stated to him that Marianne Spratt was his own niece, so that here is a direct acknowledgment of the party proceeded against, that he was cohabiting with his own niece; and this is proved, not by Charles Ray Woods alone, but by the testimony of Emma Spratt, who states that George Woods acknowledged that the person he lived with was his own niece, and she says she was present at the marriage, and that at this time Marianne Spratt is in the family-way by George Woods, her uncle; and William Alpe also speaks to George Woods having married his own niece.

This is the whole evidence taken in London, and the result is, that none of the copies of the registers are proved, for none of the witnesses prove that the exhibits are true copies of the originals; of this species of proof, therefore, there is an entire deficiency. But if oral evidence be sufficient in law, I am of opinion that there is an ample sufficiency of the very best evidence, namely, that of the nearest relations of the parties charged with this incestuous marriage and connexion. Then, assuming the oral evidence to be sufficient to establish the facts, the first point is, whether, legally

speaking, I am at liberty to take such proof? Whatever legal doubts may exist in this case, morally speaking, there is not a shadow of a doubt, because all the principal facts are deposed to by persons in whose knowledge they are, being the nearest connexions of the parties, and to whom there is no reason to impute a desire wilfully to mistake or disguise the facts.

To the evidence taken by requisition in Norfolk, various objections have been offered, to the whole and to parts. But before I consider these objections, I apply my attention to the question whether, when the oral evidence is complete, in such a case as this, it is absolutely requisite in law that the registers should be proved, or their absence accounted for.

In the first place, let us consider the nature of the case to be proved. That which is essential to the case is not the legitimacy of the parties, but their relationship by blood; it is blood which renders these marriages contrary to law, not the legality or illegality of any of the intermediate marriages. Where the legality of a marriage is in question, it has been decided that, even if the marriage be not registered at all, if the fact of marriage can be proved, the non-registration will not affect its validity; and in other Courts, the fact of marriage may be proved by witnesses, and it is not necessary to produce the register. The next point is, that we have the acknowledgment of George Woods himself of the existence of the relationship between the parties. This is evidence against himself, and similar evidence has been admitted in criminal cases, even where life has

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been at stake, as where a wife has been indicted for the murder of her husband (petty treason), and there has been a difficulty in proving the marriage, her acknowledgment of the marriage has been held to be admissible as evidence against her. I observe further, that whether there has been a marriage between the parties or not, if I am satisfied that there is a connexion by blood, even if the parties, or either of them, were illegitimate, I must come to the same conclusion, and pronounce the sentence. In considering further, whether I am entitled to dispense with the production of the register, I must look to the practice of the Court in which I am sitting, and it has been the practice to require the production of the register where it could be obtained, and I should be reluctant, unless necessity compelled me, to relax the rule. I must, however, observe, that I am satisfied that a register is not to be considered the best evidence of a marriage, nor has it ever been so considered in the books and authorities on the question. The rule respecting best evidence is, that you are not allowed, where there is evidence of a superior character, to give inferior evidence, unless you account for the non-production of the best evidence, the effect of which is to exclude all other evidence till the absence of the best evidence is accounted for. But I am of opinion that the register is not, in contemplation of law, the best evidence, for these reasons: first, that registration is not necessary for the marriage itself; secondly, that no error or blunder in the register could affect the validity of the marriage; and thirdly, that registration is not like an agreement or a deed in writing, and the contents of

which cannot be proved by *viva voce* evidence, but it is a mere record afterwards of what has been done, and no doubt a very important record to those who enter into the compact; but it is a mere memorandum of the compact they enter into, not the compact itself. I am encouraged in this opinion by the course of practice in the Courts of law, which consider, that in order to establish a marriage, the evidence of any one person present at the marriage is sufficient, without calling for the register at all.

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On the present occasion difficulties have arisen, not only with reference to the registers of marriages, but also with regard to baptismal certificates. But a baptismal certificate is no evidence of birth at all, but only of the acknowledgment of the parties that the child so baptised is theirs.

If this was the whole of the legal evidence in the cause, and I was driven to give an opinion upon this evidence, I should be disposed to come to the conclusion that it was sufficient, though I should not do so unless circumstances compelled me to do it.

But it is incumbent upon me to consider the objections to receiving the evidence taken in Norfolk, which go to this: that it is taken in such a shape and form that an indictment for perjury could not lie against any of the witnesses who should depose falsely and corruptly. Now, nothing, in my judgment, can be more dangerous to the credit of these Courts, than that it should be considered that they would decide questions affecting the rights and interests of parties upon evidence, the individuals giving which, if they depose falsely and corruptly, might not be liable to an indictment for perjury.

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Nothing, indeed, could be more fatal to the due administration of justice, than that evidence should be received under such circumstances. The effect would be, that these Courts would be attempting to administer justice in important cases, where the witnesses examined in the cause are under no apprehension that the punishment attached to the crime of perjury could be inflicted upon them, however falsely they might swear. I greatly regret that my want of experience, in regard to questions of this nature, makes me distrustful of my own judgment, but I must not shrink from the duty imposed upon me.

The objections to this evidence may be classed under two heads: the questions are—first, whether the oath was administered to the witnesses by a competent authority; secondly, whether the evidence has not been so taken, as to prevent the possibility of punishing any of the witnesses who should have perjured themselves. The first objections go to the whole of the evidence taken at Norwich; the second to that of the last seven witnesses only.

With regard to the authority to administer the oath to the witnesses, deposing under the requisition and commission, the first objection is, that there is a discrepancy between the date of the requisition and the date of the decree. I am of opinion that this cannot affect the validity of the proceedings, though the practice is not uniform; still what was done on this occasion (the requisition bearing date the day it issued, not the day it was decreed,) is not at variance with the ordinary usage of these Courts. The next objection is, that there is a variation

between the jurisdiction required to accept the requisition, and that accepting it at Norwich. Now, although, perhaps, the form of proceeding may have been, in some respects, singular, there does not appear to have been any essential defect ; though it may be different from what might have been expected, yet I must look at the usage in the diocese of Norwich ; I am not to suppose that there has been anything irregular in the present case, that is, different from what takes place in ordinary cases, and if there has not been any irregularity, it is not for this Court, addressing requisitions to country jurisdictions, to find fault with their proceedings, unless the objections affect the substantials of justice. With regard to the other objections, I hold them to relate to matters of practice only, and I do not know that all our forms should be observed in the country Courts. I am not to presume that the ordinary practice of the Court of Norwich has not been complied with ; I have no right to prescribe forms of practice for that Court, and as the deviations do not affect the essential ends of justice, I presume these are the forms of proceeding in ordinary cases, and I am of opinion they are sufficient for the purpose. If there had been any proof, or any averment, that the essential ends of justice would be defeated, or that gross injustice would be done, then I should have some ground to go upon : but there is nothing of the kind ; the objections urged (very properly,) are of a purely technical nature. I am, therefore, of opinion, that I should not be justified in scrutinizing mere matters of form, which cannot affect the purposes of justice, and it would be most dangerous, with reference to the country Courts, to convert

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mere formalities into essentials. I fear if I were to adopt this course of proceeding towards country Courts, generally, it would be productive of the worst effects ; indeed, I doubt whether any one of the country Courts would stand the test of such a scrutiny. I therefore overrule all these objections.

The effect of overruling these objections is this : it enables me to admit the evidence of the first five witnesses, who corroborate the evidence of the witnesses examined in London, and prove the Exhibits of A. B. and C.

The last objection is a question apparently of mere form, but one which I have found it no small difficulty to cope with ; it relates to the admission of the testimony of seven witnesses, examined in the manner I am about to state. Of these witnesses, the first, examined under the commission, is described as having been examined on the Articles “brought in” by Rothery, 27th November, 1839. The second witness is stated to have been examined on Articles “given in” by Rothery. The fourth witness is examined on “the said” Articles. The fifth is examined on “the aforesaid” Articles. All these are trifling and petty variations, till we come to the sixth witness, Lydia Green, and she is described as examined “on the aforesaid Articles, brought in by Frederick Clarkson.” Now, in fact, there are no Articles whatever, save those brought in by Rothery ; it is a mistake, and a very unfortunate mistake, by the examiner, and the error pervades the heading of all the depositions of all the other witnesses, seven in number. Now, I have stated my opinion, that if a prosecution for perjury could not be sustained against witnesses, I should be

bound to reject their evidence : such is the established rule of other Courts, to reject all evidence where it would be impossible, through some error, that an indictment for perjury could be sustained against the parties giving it ; and I think the rule is founded in justice, otherwise persons giving evidence would be liberated, from a consideration of great weight—the fear of punishment for false swearing. I apprehend, so far as I can form an opinion on this point, that there could be no prosecution for perjury, with regard to these seven witnesses ; for no averment could be received as to its being a mistake in the title of the depositions, and there being no Articles given in by the proctor, whose name appears in the title, the prosecution would fail. I am, therefore, under the necessity of rejecting all the evidence of these seven witnesses.

Now, let us see the effect of rejecting this evidence, and of admitting the other, upon the Exhibits. A. is proved, by one of the first five witnesses examined at Norwich, to whose evidence there is no objection, and this is the certificate of the marriage of John Woods and Lucy Ray. B., also proved, is the baptismal certificate of Caroline Woods, and C. is that of George Woods. Of the Exhibits unproved, D. is the register of the marriage of John Spratt to Caroline Woods ; E. is the register of baptism of Marianne Spratt ; and F. is the register of the marriage solemnized between the party proceeded against and Marianne Spratt. Now, the fact of marriage between John Spratt and Caroline Woods is confirmed by Caroline Spratt herself, the party married, who also proves the birth of Marianne Spratt, her daughter, and the fact of

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the marriage in 1839, between George Woods and Marianne Spratt is established by two witnesses present at the marriage.

Such being the state of circumstances with reference to the observations I made towards the commencement, I come to the conclusion, that the evidence is perfectly sufficient to enable me to pronounce a sentence in favour of the prosecutor. With regard to the earlier facts the Exhibits are proved, the identity is established ; and as to the other Exhibits, the facts to which they refer are proved by the oral evidence of persons whose testimony is unimpeached, and who are intimately acquainted with the facts and circumstances. I have no hesitation, therefore, in stating that, not being tied down by any technical rule, requiring that the registers should, in all cases, be produced, or accounted for, I am satisfied that the evidence is sufficient. All I am anxious to say is, that I hope the judgment I pronounce will not lead to a disregard of the production of registers in future ; for although the Court, in this particular case, has judged it expedient to dispense with the production of the registers, it would be extremely inconvenient in practice if their production were neglected.

I have one other objection to dispose of. It has been suggested that both these parties ought to have been cited, as the Court is called upon to pronounce the marriage invalid. I am not aware of any authority which requires that both parties should be cited. A question might arise hereafter, whether one of the parties not having been cited, she is bound to abide by the judgment : that is a question into

which I do not enter. The question I have to consider is, whether it is absolutely necessary, according to the practice of the Court, in every case of an incestuous marriage, to cite both parties. In *Burgess v. Burgess* (a) it was not done ; it is true that in that case there was no marriage ; but in *Blackmore and Thorpe v. Brider*, (b) there was a marriage, which was pronounced against, and only one party was cited.

I therefore pronounce this marriage null and void, and enjoin the parties to cease from continuing their incestuous connexion ; and I add that this is a sentence which the Court feels bound to enforce, not only from legal considerations, but by the principles of general morality ; for whatever ideas may be entertained with regard to marriages between persons within the degrees of affinity, there is no difference of opinion in respect to marriages of this kind, where the parties are connected by consanguinity, which are exceedingly revolting to the opinions and feelings of mankind, and it is inconsistent with the public welfare that such connexions should be allowed to continue. I also condemn the party proceeded against in all the costs, except those incurred by taking the evidence, which I have been compelled to reject : the other party must bear the loss occasioned by the error of the examiner selected by himself. I think it right to say, that although, in some of these cases, public penance has been directed, after considering the subject as carefully as I could, it has appeared to me advisable not to make that a part of my sentence.

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(a) 1 Cons. R. 284.

(b) 2 Phill. 359 ; S. C. 1 Cons. R. 393, n.

PREROGATIVE COURT OF CANTERBURY.

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Papers propounded as the will and codicils of a party deceased, opposed on the ground of forgery and fraud, pronounced for by the Court, but with great doubt and difficulty, upon the testimony of two attesting witnesses to the execution.

PANTON against WILLIAMS.

This was a suit respecting the validity of a will and two codicils, of Jones Panton, of Plasgwyn, in the county of Anglesey, Esq., who died on the 26th of May, 1837, aged seventy-five, a widower, possessed of a very large property. The real estates were situated in four of the counties of North Wales, —Anglesey, Denbigh, Flint, and Merioneth; and he had some houses in London, besides landed property at Portsmouth and at Finchley. The personal property amounted to about 50,000*l*. The family estates came into his possession at the death of his eldest brother, in 1822. He left behind four children, two sons and two daughters, (his family having originally consisted of four sons and three daughters,) and four grandchildren, the issue of a son and a daughter deceased. Two of the sons, Mr. Jones Panton and Mr. Thomas Panton, and one daughter, Mrs. Bulkeley Williams, died in the lifetime of the testator. The surviving children were Mr. Paul Griffith Panton, Mr. William Barton Panton, Mrs. Hamilton, and Mrs. Thomas Williams. The parties in the suit were Mr. William Barton Panton, of Garreglwyd, in the county of Anglesey, Esq., the youngest son of the testator, and sole executor named in a codicil to a prior will, and Thomas Williams, of Brynbras Castle, in the county of Carnarvon, Esq., the husband of the testator's

youngest daughter, who propounded the papers in question as sole executor. The papers were opposed on the ground of forgery, the appearances on the face of them raising (as alleged) an inference, that they had originally contained other matters, written in pencil, to which the signature of the deceased in ink had been obtained, the pencil writing being afterwards rubbed out, and a testamentary disposition (in the handwriting of Mr. Williams,) substituted. The case on the other side was, that the pencil marks, whence the alleged fraud was inferred, had been placed upon the papers since they had left the custody of the executor, and that the evidence in support of the charge of forgery was the result of conspiracy, perjury, and subornation of perjury. (a)

The argument occupied several days; *The Queen's Advocate* and *Phillimore* for Mr. Panton, against the papers; and *Addams* and *Haggard* in support of their validity, on behalf of Mr. Williams.

JUDGMENT.

SIR HERBERT JENNER.

This is a case which came before the Court under very extraordinary circumstances. A vast number of questions have been raised in the course of the proceedings in this Court; the cause itself is one of

(a) Mr. Thomas Williams, the party in the cause, and Ellen Evans and Anne Williams, the two attesting witnesses to the will, were apprehended on a charge of forgery, during the progress of the proceedings in this cause, tried at the Central Criminal Court, Old Bailey, in April, 1838, on a charge of forgery and acquitted. Ellen Evans and Anne Williams recovered damages in an action at law against Mr. William Barton Panton, for a malicious prosecution; but the verdict was afterwards set aside upon a bill of exceptions, in the Exchequer Chamber.

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the most complicated that ever, I think, occupied the attention and consideration of the Court ; the pleadings are of considerable length ; a great number of witnesses were examined on these pleas, and their evidence has extended to a great bulk, upon points some of them very material and important, and others which are, perhaps, of little moment. The arguments of counsel have been extremely long and elaborate, and the Court has thought it right, in a case of this description, in which not only a considerable amount of property is involved, but the character and moral conduct of individuals—the parties in the cause, and witnesses on both sides, are also very materially concerned, to take, and it has taken, all the circumstances into its most mature and deliberate consideration, and has endeavoured, as far as it could, to deal out an equal and impartial measure of justice to the parties, as far as the evidence in the cause will enable it to do.

This is not a question which depends at all on a consideration of the capacity of the deceased ; for it is admitted on all hands that he was a person of perfectly sound mind, memory and understanding. The question is, whether the papers now propounded before the Court are or are not the act of the testator ?

The landed property of the deceased came into his possession in 1822, on the death of his eldest brother, and he also, at that time, acquired considerable personal property, I presume one-third of 50,000*l.* or 60,000*l.*, of which his brother died possessed. On the marriage of his eldest son, which took place in the year 1823, a settlement was made,

by which certain property was settled upon that son and his heirs, the deceased reserving his own life interest in it, and also a reversion, in the event of his eldest son dying without issue. These estates were also charged with 42,000*l.* for the benefit of the six younger children—that is, 7,000*l.* for each ; and in the event of the wife of the eldest son surviving her husband, the estates were charged with a jointure of 900*l.* a-year for her. The estates, therefore, which were under settlement, were of very considerable amount. There were also unsettled estates ; what their value was does not appear, but it was not, probably, very large.

The deceased made several wills after he came to the possession of the family estates. In January, 1824, the deceased made a will, (the earliest before the Court,) in which, without referring to the power of disposition which he had over the settled estates, in the event of his eldest son dying without issue, he bequeathed all his unsettled estates equally between his six younger children, and appointed Mr. Paul Griffith Panton, the second son, and Mr. Hamilton, the husband of his eldest daughter, executors. By another will, in March, 1824, he exercised the power of appointment which he had over the settled estates, and in the event of his eldest son dying without issue, he appointed the settled estates, in the first instance, to Mr. Paul Griffith Panton and his issue, with remainder to Mr. Thomas Panton and his issue ; then to Mr. William Barton Panton and his issue ; afterwards to Mrs. Hamilton and her issue ; then to Mrs. Bulkeley Williams, (described as Jane Elizabeth Panton,) and, in the last place, to Mrs. Thomas

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Williams, under the name of Laretta Maria Panton ; so that all the parties were named in this will in the order not exactly of their birth, but the males before the females, and their descendants. The unsettled property and the personalty were to be divided equally between the six children, and the same executors were appointed as in the will of January, 1824, namely, Mr. Paul Griffith Panton and Mr. Hamilton.

In February, 1825, he executed a codicil, whereby he gave a small estate in the county of Denbigh, to Mr. Paul Griffith Panton, and the rest of the unsettled estates to his six younger children, as tenants in common : thereby adhering to the general scheme of disposition which was made by the will of 1824, putting the six younger children nearly on an equality with each other.

So the testamentary disposition remained till November, 1828, when he made an entire new will, and by that will, in the event of his eldest son dying without issue, he devised the settled estates, first, to Mr. William Barton Panton and his issue, with power to charge them with a jointure of 500*l.* a-year to his wife ; on failure of issue, to Mrs. Hamilton and her issue ; then to Mrs. Bulkeley Williams and her issue : and then to Mrs. Laretta Maria Williams, (the wife of Mr. Williams,) the party in this cause and her issue, with power to charge the estates with portions for the younger children. He then gives an estate in the county of Denbigh to Mr. William Barton Panton, his heirs and assigns ; and the remainder of his estates in England and Wales, and his personal estate and effects, he gives to Mr. W. B. Panton and his daughters,

Mrs. Hamilton and Mrs Thomas Williams, and appoints them executors: there is, therefore, in the will of 1828, a departure from the former disposition contained in the wills to which the Court has adverted, by excluding Mr. Thomas Panton, and Mr. Paul Griffith Panton.

In November, 1829, he made a codicil to that will, by which he bequeathed plate, books, and other articles, at Plasgwyn, to the possessor of that estate for the time being, as heir-looms; and other fixtures which were in that house he bequeathed to the possessor of that estate at the time of his death.

On the 21st of April, 1831, he made a further codicil to that will, whereby he revoked all the devises and bequests given by the will of 1828, and the codicil of 1829, in favour of Mrs. Hamilton and Mrs. Williams, and also revoked their appointment as executors, and gave 10*l.* to Mrs. Hamilton and 400*l.* to Mrs. Williams, and gave all his unsettled estates, and the residue of his personalty, to Mr. William Barton Panton, his heirs and assigns, and appointed him sole executor.

On the 29th of May, 1833, the deceased made a further codicil, by which he revoked the legacy of 400*l.* given to Mrs. Williams by the codicil of 1831, and, instead thereof, gave her 200*l.* for her sole and separate use, and in other respects he confirmed the will and codicils. Here, therefore, was a most complete departure not only from the scheme of the wills which he executed in the early part of the time after he came into the possession of the family estates, but also from the bequests which he had given so late as the year 1828, in favour of Mrs Hamilton and Mrs. Williams.

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It is to be observed, that, at the time when the codicil of 1831 was executed, Mrs. Bulkeley Williams, Mr. Jones Panton, his eldest son, and Mr. Thomas Panton were dead. Mr. Jones Panton died in 1830; Mrs. Bulkeley Williams died before that period; Mr. Thomas Panton died on his passage home from the East Indies.

The Court will presently consider the circumstances under which it is *probable* that this deviation from the original intention, expressed in the former wills, was made.

But these are not the last testamentary acts of the deceased. On the 6th of November, 1834, the deceased made a will—at least, is alleged to have made a will, for that is the question the Court has to determine; a paper is produced, which purports to be a will of the deceased, and to have been executed by him in duplicate. By that will he devised all his estates in Anglesey, particularly the estate of Plasgwyn, which is expressly named in a codicil to that will, (and which formed part of the settled estates, on the marriage of his eldest son), to Mr. Paul Griffith Panton and his heirs, who had been omitted and passed by in the will of 1828, and the codicils of 1829, 1831, and 1833; all his estates in Denbighshire and Merionethshire, to Mr. William Barton Panton and his heirs; and all the estates in Flintshire to Mrs. Hamilton, Mrs. Thomas Williams, and the children of Mrs. Bulkeley Williams, as tenants in common. Then he gives all the residue of his real and personal estate, to Mrs. Thomas Williams, and makes Mr. Williams, her husband, sole executor. Here is not only a complete departure from the will of 1828, and the

codicils to that will, but also a departure almost as great from the wills of 1824 and 1825, as in the case of Mr. W. B. Panton under the will immediately preceding this; and the effect of this will is to give, in point of fact, all the personal estate to Mr. Thomas Williams, for, although it is given to the daughter, who was married at that time to Mr. Williams, it is, in fact, left to Mr. Williams, as there is no provision that it shall be for the separate use of the wife.

In October, 1836, he made a codicil, by which he recited that it was his intention to apply to a Court of Equity to set aside the settlement which had been made on his eldest son's marriage; and declares it to be his intention that nothing contained in his will shall be deemed or construed to vary or alter in any manner whatsoever the bequest or disposal of his personal property as therein contained; and he confirms the disposition of all his leasehold estates, stock, or funded, or otherwise invested property, money, household furniture, plate, linen, china, books, or library pictures, farming stock, and other personal property, to Mrs. Thomas Williams, her executors and administrators, and confirms the appointment of Mr. Williams as executor: so that, it does little more than confirm the disposition made by the will. In the will, no reference had been made to the settlement on the marriage of the eldest son; but there was a devise of all the estates in Anglesey, particularly mentioning Plasgwyn, the house where the deceased resided, which is bequeathed to Mr. Paul Griffith Panton and his heirs; and, in fact, the devise to him, and the benefit derived by him from that devise, must

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depend upon the revocation of that settlement, on an application to a Court of Equity, or upon the death of the child of the eldest son of Mr. Jones Panton under the age of twenty-one; for so I take the nature of the settlement, that if he left a child which did not attain the age of twenty-one then the property would revert to the testator.

There is a further codicil, which bears date in May, 1837, and that again is a mere confirmation of the will of 1834, which it expressly refers to and confirms; and it also bequeaths a legacy of 20*l.* to Jane Thomas, the deceased's upper housemaid.

Now these last three papers are those upon which the present question arises. They are propounded by Mr. Thomas Williams, the executor named in them; and are opposed by Mr. William Barton Panton, as sole executor named in the codicil of 1838; and the question is, whether or not these three last-mentioned papers—the will of 1834, and the codicils of 1836 and 1837—are the valid acts of the alleged testator? It may be proper here to observe, that these three papers are all admitted to be in the handwriting of the executor, Mr. Williams, the husband of the residuary legatee, and, in point of fact, the legatee, I may almost say, the *universal legatee*, so far as the personal property is concerned. The will purports to be attested by three persons, who were in the service of Mr. Williams. Ellen Evans, lady's maid to Mrs. Williams, Ann Williams, their cook, and John Williams, who was in the service of Mr. Thomas Williams, and who is since dead. The first codicil purports to have been executed in the presence of Ellen Evans alone; the second codicil is without witness. The

will and the first codicil were executed in the house of Mr. Williams, at Brynbras, where the deceased is stated to have been on a visit; and the third purports to have been executed in the deceased's house, at Plasgwyn, upon Sunday, the 7th of May, upon which day, it is stated, Mr. Williams visited the deceased there.

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Now, these circumstances are certainly such as must necessarily create a considerable degree of jealousy and caution in the mind of the Court, in examining the proofs adduced in support of these instruments. It cannot be denied, that, where a will is so much to the benefit of the party by whom it is prepared, in whose house it purports to have been executed, by whose servants it purports to be attested, who were it seems, instructed to keep the matter secret, (for it is so stated by Ellen Evans and Ann Williams) at the time of execution, and where the last codicil purports to be executed, not in the presence of a witness, but, though in the house of the deceased, in the presence only of Mr. Williams, no other person being present—I say, these are all circumstances which must necessarily create a considerable degree of jealousy in the mind of the Court, and vigilance in examining the evidence adduced in support of the acts; and still more will its jealousy and vigilance be awakened, when it considers that, in point of fact, Mr. Williams, a stranger in blood, is substituted in the room of Mr. W. B. Panton, if not as universal legatee, yet, as residuary legatee, in a large amount of the deceased's property. On the other hand, it cannot be denied that proof may be adduced adequate to discharge the burden thus thrown on the

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executor who propounds these papers, and it may go to account for this departure, from the intention evidenced by former testamentary acts, by a sudden change in the feelings and affections of the testator towards the different members of his family; by shewing that the deceased was of a fickle and changeable character and disposition; and that he declared his intention before the act was performed; or by a recognition of that act, and allusion to the disposition contained in it after it had been done; and there may be intrinsic evidence arising from the contents of the papers themselves, shewing that they could only have proceeded from the testator himself; or, in the absence of circumstances leading to probability or improbability, on the one side or other, they may be supported by the irresistible evidence of witnesses, of whose credit there is no impeachment whatever.

The state and condition of the deceased and his family, at the time when the execution of these instruments took place, may not be immaterial to be considered, in order to see, first, what is the probability of the disposition contained in these papers, with reference to the state of his affections.

I have already stated, that, in the year 1822, the deceased, (who had formerly been a stamp distributor in the county of Anglesey) succeeded to the family estates, and that, upon the marriage of his eldest son, he provided for him and his family by settlement of these large estates. In 1828, then, before the execution of the subsequent will, what was the state of the deceased's family? In 1828, there had been a quarrel or misunderstanding between the deceased and his son, Mr. Paul

Griffith Panton, and it may not therefore have been unlikely that he would pass by him, as he appears to have done in 1828, in the disposition of his property, though, on the death of his father, he would come into the possession of 7,000*l.*, originally settled on him as one of the younger children; and it appears that he received from the deceased a bond for 300*l.* per annum, or some bond for securing the payment of a certain sum, if not the precise interest of 7,000*l.*, during his life. With respect to Mr. and Mrs. Hamilton, it should seem that she would come into the possession of 7,000*l.* on the death of the testator, but that she had no bond given to her to secure the payment of any sum, she being, as it is alleged, well provided for. With respect to Mr. Thomas Panton, he does not at that time (1828) appear to have been dead, and there is no particular reason given why he should be passed over in that will. He would come into the possession of 7,000*l.* on the death of his father; and he had also 300*l.* per annum, secured by a bond; but he is passed over altogether in the will of 1828.

At this time, then, the three persons who were to be principally benefitted are Mr. William Barton Panton, Mrs. Hamilton, and Mrs. Thomas Williams; they were to divide the unsettled estates and personal property between them, and were appointed joint executors.

The Court at present must take it, that this will of 1828, and the two codicils are admitted to be valid. No question is raised with respect to them in the pleadings, though it has been argued, that, if the disposition contained in these papers was a

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departure from the original intention of the former will, it is not at all improbable that the testator might again change his mind, and dispose of his property in a manner different from that in which it purports to be disposed of by the will to which I am now adverting.

In April, 1828, shortly after that will had been executed, Mrs. Thomas Williams married; and a circumstance occurred in 1829, which would go to shew that the deceased at that time was considerably annoyed, and expressed a certain degree of anger against his daughter: an action was brought against Mr. Thomas Williams, her husband, by a person named Jones, for a breach of promise of marriage by her; and it does appear, by a letter written by the deceased, that he was called upon to pay a certain sum of money on this account, (the action being compromised), to prevent exposure in a Court of justice; and his letter refers to that circumstance. It also appears, that at a later period, though the precise time is not exactly stated, according to the evidence of Mr. Bettiss, the deceased told him there had been a quarrel between Mr. W. B. Pantou and Mr. Thomas Williams, in the course of which a blow had passed from one to the other. Mr. Bettiss says the deceased told him, and it appears from the evidence of Jones, the housekeeper of the deceased, that there was an interval during which the visits of Mrs. Williams were broken off from Plasgwyn and, therefore, it is not impossible that this might have produced the change in the deceased's mind with respect to the benefit which he gave to Mrs. Williams, by the will of 1828, and which was

reduced by the codicil of April, 1831. With respect to Mrs. Bulkeley Williams, it should seem that the deceased had, after her death, brought an action against her husband for a ring which he retained in his possession, which the deceased considered belonged to him. She was dead before the time this codicil was executed ; and it appears that the deceased had certainly no very great partiality for Mr. Hamilton ; therefore, there is no reason to suppose he would have had any great portion of the deceased's property, beyond that settled on his wife, as one of the younger children. With respect to Mrs. Hamilton, nothing appears—there is no reason, I presume, for not making her an allowance at the time of her marriage, but that she was already well provided for, which induced him to exclude her from any benefit. With respect to Mrs. Thomas Williams, I have already stated that, in 1831, her legacy was reduced to 400*l.* ; and again, in 1833, that is further reduced to 200*l.* for her sole and separate use ; as if the deceased had at this time not entertained that degree of regard for and confidence in Mr. Williams, which it is alleged he did entertain in November, 1834, and some time antecedent to that date.

With respect to Mr. W. B. Panton, he was the youngest of the deceased's sons ; he had never left his father house, that is, he always continued domiciled with him ; he had the management of his father's property very much confided to him, and it is alleged that he was a favourite son ; and there is abundant evidence to shew that the deceased and himself bore great affection towards each other ; that they were mutually attached one

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to the other; and though it has been suggested that the deceased was in fear of this son; that he was intimidated by him; that he was under the control and influence of Mr. Rumsey Williams, a solicitor, whose daughter, in 1832, Mr. W. B. Panton had married, I have looked in vain to find anything that would shew that Mr. W. B. Panton had conducted himself towards his father in any other than the most respectful and affectionate manner. Although it may be true that he partakes in some degree of the warmth of temper to which the natives of the principality are subject, and though in one or two cases he may have come into personal contact with one or other of the servants, yet there is nothing from which the Court can collect that there was any intimidation or violence on his part towards his father, or any other than the most respectful and affectionate conduct. There is no evidence whatever to shew that there was not a reality of affection between them; and we have a witness, who is spoken of on both sides as a person worthy of credit, namely, Mr. Roberts, the medical attendant, who speaks to the attentions paid by Mr. W. B. Panton to his father, and to the return made, and which he believes to have been sincerely made, on the part of the father to the son. And the tenderness and affection of the deceased appear also to have been extended to the wife and daughter of Mr. W. B. Panton. Nothing can be more clear or explicit than the declarations of Mr. Roberts on this point. I cannot think that the Court can come to any other conclusion, even without the evidence of Henry Brereton and Grace Huxley—Brereton being the steward of the de-

ceased, who had been in the family many years, in the service of the brother, before the deceased came into possession of the family estates—who says they lived on the most affectionate terms together, and the deceased would scarcely do anything in the management of his property without consulting Mr. W. B. Panton; he kept hounds and horses and servants for him; he lived with him in the same house, with his wife and child, and, in short, was entirely domesticated with him. There is nothing from which the Court can collect that the deceased was not sincere in his expressions of regard and attachment to him and his wife and child; therefore, it is somewhat difficult to account for his departure from the will of 1828. I think there can also be no doubt, from the evidence of Mr. Roberts, and of the servants, that, during the last illness of the deceased, there was the same affection and regard, the same attention paid to him by his son and the son's wife, and the same degree of attachment manifested by the deceased to his son and his wife, as is alleged in the early part of their communication with each other; and that so affectionately attached was the deceased to his son and his son's wife, that he would scarcely take any kind of medicine or food, during his sickness, from any other hands but theirs. I am, therefore, of opinion, that there was no motive whatever, from any change of conduct of Mr. W. B. Panton to the deceased, or of the deceased towards him, which should have led to this alteration—to the substitution of Mr. Williams, (for so it is), for his son.

Now, the deceased having died upon the 26th

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of May, the funeral took place upon the 2nd of June ; the family attended the funeral, and amongst others, Mr. Bulkeley Williams and Mr. Paul Griffith Panton, though he had not been in his father's house for ten years preceding. There were other branches of the family present, and Mr. Thomas Williams also attended, but did not arrive at the house until the procession was quitting, and did not return to the house after the ceremony concluded, but went to his own house ; it being usual, in that part of the country, that the will of the testator should be read after the funeral had taken place. However, it does not appear that this was done on that occasion, as Mr. Williams, a person having an interest in the deceased's property, was not in attendance. It seems that some communications passed between him and Mr. W. B. Panton not of a very friendly nature ; indeed, it is quite clear that, from the time of the quarrel, there was nothing of the nature of cordiality existing between Mr. Williams and Mr. W. B. Panton, and without any communication between the parties, Mr. Williams left them after the funeral had taken place. Another day was proposed for reading the will, which was finally fixed for the 9th. Two letters were written in the intermediate time, one dated the 5th of June and another the 6th, with respect to the time at which the reading of the will was to take place ; and Mr. Williams seemed to consider that his convenience had not been consulted by Mr. W. B. Panton, and states his intention of leaving the country before the 9th of June, on account of the state of health in which his wife was, who required change of air : but in

that letter he informs Mr. W. B. Panton, as he should not be present, that Mr. Boggie, a gentleman of the law, would attend for him. Upon the 9th of June neither his solicitor nor Mr. Williams was present; but the will is read, and it seems that Mr. Owen Gethen Williams, a brother of Mr. Thomas Williams, who resided within a short distance of the deceased's house, and who had been in communication with his brother on the subject, had been sent to Plasgwyn, to say that he wished to see the will, and would either, if they would send it to his house, read it there, or come over to Plasgwyn to read it. The latter is the mode adopted, and Mr. Owen Gethen Williams, upon the same day, the 9th of June, proceeds to Plasgwyn, where he reads the will, and makes extracts from it on behalf of his brother.

Now, at that time, the preparation for the funeral of the deceased had been made, and the funeral itself had taken place, under the direction of Mr. W. B. Panton, as executor of the deceased. On this 9th of June, and upon the funeral, there was no interruption on behalf of Mr. Thomas Williams; but it does appear, that upon the 6th of June, (from the letter of the 6th of June) Mr. Williams had declared that no will should be proved unless it had been seen by the family, and that he would enter a *caveat* against it; and upon the 9th of June, when Mr. O. G. Williams attends, and reads the will, and makes extracts from the will and the codicils, he gives no intimation whatever that his brother was in possession of a will of later date than either the will of Mr. W. B. Panton, or the codicils to that will. Not the least intimation was

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given of the existence of such a will, by which the authority of Mr. W. B. Panton was superseded, and Mr. Williams had been substituted as an executor instead of him. At this time, it should seem, by the evidence of Mr. O. G. Williams, that he and his brother had been in communication with each other, that he had been apprised by him of the existence of this will of 1834, and of the codicil of May, 1837 ; for as Mr. O. G. Williams expressly states, it was under his advice that Mr. Thomas Williams, who consulted him whether it would not be proper that he should go over to Plasgwyn, to assert his rights as executor, abstained from so doing ; but he came to town for the purpose of consulting and advising with a professional person in London, he at that time not being in possession of the will of November, 1834, and the codicil of 1836, though he was in possession of the codicil of 1837. The former will and codicil, (that is, the will itself and the first codicil, together with certain other papers of a testamentary nature), had been deposited in the care of Messrs. Child and Company, the bankers—not of the deceased, but of Mr. Thomas Williams—and remained there deposited until the month of June after the deceased's death, when they were removed from thence, in the presence of the person who deposited them, Ellen Evans, accompanied by Mr. Boys. At this time, therefore, the whole of the family assembled at Plasgwyn were in entire ignorance of the existence of any other will of later date than Mr. W. B. Panton's and no intimation whatever was given that there was such a will.

Now, it seems that, on behalf of Mr. W. B. Pan-

ton, a letter was addressed in the usual course of business to a proctor of this Court, desiring him to send down a commission to swear Mr. W. B. Panton as executor to the will of 1828. It was stopped by a *caveat* having been entered on behalf of Mr. Thomas Williams; and upon that *caveat* being warned, it appeared it was on his behalf, as executor named in the will of 1834, and the codicils of 1836 and 1837, of which he prayed probate. This, then, was the first intimation of the existence of any will of later date given to Mr. W. B. Panton, or rather to his advisers; for, according to the evidence of Mr. Bettiss, Mr. W. B. Panton does not appear to have had an intimation of the existence of the will till the 26th of July following, though, I think, there may be some incorrectness in this, and that it must have come to the knowledge, at least, of his advisers, at an earlier period, though it is probable that the contents of the papers were not known at Anglesey or Plasgywn till a later period.

The *caveat* having been warned, a proctor appears for Mr. Williams, as executor of a will and two codicils, the date of which is set forth, and of which he prays probate. These scripts were not then (as I apprehend) exhibited to the other party, or to any other persons advised with by him; but upon the 18th of July, after other proceedings had taken place in the cause, an affidavit of scripts is made, dated the 18th or 19th of July; it is brought into Court on the 22nd of July, and then it is (I apprehend) for the first time that the contents of the will and codicils were known to the adverse party, unless private communications passed between

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them at an earlier period, of which no trace is to be found in the proceedings in this cause. Therefore, I think it not improbable that, when Mr. Bettiss states in his evidence, that the first intimation which Mr. W. B. Panton had of any other will than that of which he was executor, was upon the 26th of July, at the time when the sale was advertised to take place at Plasgywn,—at which Mr. O. G. Williams declared there was a will of a later date, by which Mr. Thomas Williams was made executor, and, consequently, the authority of Mr. W. B. Panton, under which he directed the sale to take place, had been superseded,—that that is what is meant to be stated.

Upon the production, therefore, of these papers it is quite clear that there must have been a very considerable degree of surprise created in the mind of Mr. W. B. Panton, of Mr. Rumsey Williams, his father-in-law, and Mr. Bettiss, who had married a sister of Mr. Rumsey Williams, in short, of all Mr. W. B. Panton's friends, who had supposed, not only from the existence of the will and codicils, but from the conduct of the deceased, and certain circumstances to which I will presently advert, that he was the person to whom the great bulk of the testator's property would descend on his death, and which is also in conformity with declarations stated to have been made by the deceased, not only at the time of the marriage of Mr. W. B. Panton, but afterwards.

Upon this affidavit of scripts being brought in, the usual steps being taken, the will was propounded in a common *condidit*—that is, with the exception of those Articles which are usually added

to the common *condidit*, where one of the subscribing witnesses to the will has died before the suit. Upon that allegation, the two surviving witnesses were examined, and the death and character of the third witness, John Williams (whose name appears subscribed to the paper), were examined to and proved. Upon this, publication being prayed, an Allegation or plea was given in, stating the ground of opposition to this will; its admissibility was debated; it was directed to be reformed, and was afterwards admitted as reformed, and upon that Allegation many witnesses have been examined.

The examination of these witnesses was taken under a commission at Carnarvon. In the first instance, there had been some mistake with respect to the parish in which Carnarvon was stated to have been locally situated, and another commission issued, and was opened upon the 10th or 11th of January, 1837, and the depositions under it were continued till the 17th of January, when Mr. Williams, who, being a solicitor, conducted his own cause at Carnarvon, before the examiner, (his proctor having left Carnarvon) protested against a further examination of witnesses, until it was ascertained whether the term probatory, which had then expired, would be extended. Application was accordingly made to the Court, and the term probatory was extended, and the examination was renewed upon the 22nd of January. Upon the commission being returned into Court, on the 2nd or 3rd of February, an Allegation was asserted on behalf of Mr. Williams.

But further proceedings in this Court were interrupted by an occurrence of a most extraordinary

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description ; for it seems that, in consequence of some discoveries alleged to have been made just immediately previous to the closing of the commission, Mr. Thomas Williams and the two maid servants were apprehended on a charge of forgery, and were committed to take their trial at the Central Criminal Court, which took place in April, 1838, and terminated in their acquittal. The proceedings in this Court, under such circumstances, were almost necessarily suspended ; for it was quite impossible to suppose that Mr. Williams's proctor could give in his Allegation in answer to the plea on the other side, in explanation or denial of the circumstances therein stated, whilst such a charge was hanging over his head, and more particularly since the whole of Mr. Williams's papers were seized when his person was arrested, and amongst them the correspondence in reference to this case, and between him and his proctor. Therefore, the proctor very naturally declared he would waive the Allegation he had asserted, and he prayed publication on the evidence which had been already given ; and the prayer would have been acceded to, but that additional Articles were asserted on behalf of Mr. Panton. Now, the bringing in of these additional Articles was most strongly objected to on behalf of Mr. Williams, under the advice of his counsel (and very properly) ; but the other party pressed the bringing in of these Articles, and, before the trial had been concluded, an act on petition had been entered into on the prayer of the proctor for Mr. W. B. Panton, stating the grounds on which he considered himself at liberty to bring in these additional Articles. The Court

(after the trial was terminated), after hearing counsel on both sides, was of opinion that the proctor was entitled to bring in these additional Articles: they were brought in accordingly, were debated, and ordered to be reformed; brought in as reformed, and admitted, and witnesses were examined on them. Mr. Williams also afterwards brought in an Allegation in the principal cause, by way of answer to the charges against him in the former Allegation on behalf of Mr. W. B. Panton and the additional Articles. Other allegations were also given in, and after the examination of all the witnesses had been taken by commission, and was in the Registry, the evidence was published, and the cause came on for hearing in the usual course. The Court has thought it right to state the nature and circumstances of the proceedings, because there never was a case before this Court under circumstances so extraordinary as these.

Now, the grounds upon which the opposition to this will rests must be noticed particularly. Some of them are more prominent than others; some, which were apparently important in the first instance, became of less importance in the progress of the cause; but there are some, the evidence on which required to be minutely read by the Court, more than once, after the arguments of counsel were concluded; and to some of these I must particularly advert.

A charge is made of forgery against Mr. Thomas Williams, the executor, not only as arising out of the facts stated in the additional Articles, but a charge was originally made in the first allegation upon the other side. That charge has been not only denied

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by those who have advocated the cause of Mr. Williams, but they have recriminated upon the other parties, accusing them, or at least those by whom they are advised; I do not mean any of the practitioners of this Court, but those who have had the management of the business in the country. Mr. Rumsey Williams, father-in-law of Mr. W. B. Panton; Mr. Bettiss, who married a sister of Mr. Rumsey Williams; Mr. Spencer, Mr. William Jones, of Glanbenno, a solicitor, and others who are apparently persons of general respectable character and to be impeached only by the manner in which they have deposed and conducted themselves in the present proceedings—these gentlemen have been charged with fraud, forgery, perjury, subornation of perjury, and conspiracy, so that, upon the one side or the other, it seems agreed, a most atrocious fraud has been attempted to be practised on the deceased (supposing Mr. Williams to be the party), and on the Court, and other persons engaged in the cause, supposing the other persons to be the authors. This case, therefore, imposes upon the Court a most unpleasant duty—one which it is seldom called to perform, namely, to decide upon which of the two parties it is that the crime of forgery is to be affixed, as well as the further imputation of supporting that forgery by perjury, subornation of perjury, and conspiracy; and I must say, that, in the whole course of my experience, I do not remember a case in which so much contradictory evidence has been adduced as in the present, for there is scarcely a fact throughout the whole case, upon which the witnesses, on each side, are not directly at variance.

A good deal has been said, in the course of the argument, upon the question as to which side the *onus probandi* lies on. It was urged on behalf of Mr. W. B. Panton, that, in a case of this peculiar description, namely, where a large benefit is given to the party by whom the papers were prepared, in whose house they were executed, by whose servants they purport to be attested, and where there is such a departure from former testamentary intentions, the duty lay upon him, the party propounding them, to discharge the *onus* of proof. On the other hand, it was contended (and, I think, properly contended), that if Mr. Williams was able to prove, by satisfactory testimony, the execution of these papers, the signature of the deceased, he being a person of perfectly sound mind, memory, and understanding, which is not denied, he had thereby *primâ facie* discharged the burden of proof upon him; and then it lay upon the other side to support, by as credible testimony, the charge of fraud imputed to him; and I think that, this is the mode in which the different burdens are to be discharged by the different parties. Where the person by whom a will is prepared propounds it, the propounding of that will necessarily requires a certain degree of proof; but when it is proved that it was executed by the deceased, being of perfectly sound mind, memory, and understanding; that it was read to him, and he knew the contents; then *primâ facie* the *onus* is discharged, and if nothing to the contrary is shewn, the paper will be entitled to the probate of the Court. When incapacity or doubtful capacity is brought forward, or circumstances to shew that the deceased executed the paper with-

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out a knowledge of its contents, that he was imposed upon, or was compelled by force to execute it contrary to his own will, it lies upon the parties who make the charge to substantiate it. Therefore, though this case comes before the Court under circumstances of very considerable difficulty and very considerable suspicion upon the face of it, the Court must consider it with reference to all the circumstances of the case, and pronounce whether, the *onus* of proof on either side, has been adequately discharged.

In all these cases, whether of impaired capacity, of weak capacity, or where there are any other grounds of opposition, the first question is, the probability of the disposition contained in the papers propounded; because, if a natural foundation is laid for the disposition, a slighter degree of proof will probably satisfy the Court, than where the disposition is improbable in itself to any great degree. Now I have already stated, that, with respect to Mr. W. B. Panton, it is contended there is laid a very strong foundation for a large benefit to him, from the manner in which the deceased and he lived together; from their mutual affection and attachment, and from the continuance of that affection down to the latest period of the deceased's existence, and increased, if possible, by what took place during his last illness. With respect to Mrs. Williams, the case seems to be this:—she certainly is proved by Mr. Roberts, and by other witnesses, to have been at least as great a favourite with the deceased, previous to her marriage, as Mr. W. B. Panton was. She was the youngest daughter of the deceased; she was the last married, and Mr.

Roberts states that he did, from his observation, believe that the deceased entertained a most sincere regard and affection for her ; that she was a favourite daughter ; and it appears that, though there had been some interruption to their frequent communication and visits, yet a reconciliation had taken place, and that, from the year 1829 (when the action was brought, which was the first cause of dissatisfaction on the part of the deceased), they were in the habit of visiting each other ; that he went to pay a visit to them, three, four, or five days continuously in the spring and autumn, and that Mr. Williams and his wife, though not in the habit, after the quarrel with Mr. W. B. Panton of sleeping there, yet went frequently to call upon the deceased ; and Mr. Williams was in the habit of going there, and his visits were usually paid on a Sunday, that being the day on which the deceased was most likely to be found at home. And there can be no doubt there was a considerable degree of attachment between the deceased and Mrs. Williams, and a certain degree of regard towards Mr. Williams, her husband ; for it is stated on testimony which the Court sees no reason to distrust, that when Mr. Williams came to the deceased's house, he was received by him in a kind and friendly manner ; and it is also proved that a certain degree of confidence was placed in Mr. Williams by the deceased, for he entrusted to him the management of his London estates, and consulted and advised with him as to the proposed partition of the estates between himself and Mr. Hurlock, with whom he jointly held them, and that the negotiation was conducted on behalf of the

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deceased by Mr. Williams; and it should also seem, that this confidence in Mr. Williams was unknown to Mr. W. B. Panton and other members of the family, for it was not till after the death of the deceased that they were aware that Mr. Williams was ever employed by him as his agent.

Now it certainly would not have been a matter of surprise if, at a late period of the deceased's life, after the year 1833, when the intercourse between him and Mrs. Williams had been renewed, (if in fact it had ever been interrupted for any length of time), he should have made a larger provision for her than she took under the codicils of 1831 and 1833, and that he should have replaced her in the situation in which she stood under the will of 1828, before it was altered by those codicils; but that Mrs. Williams should be entirely substituted in the room of Mr. W. B. Panton, against whom the deceased appears to have had no cause of complaint whatever, is a circumstance which the Court cannot well account for. There is no trace in the evidence from which the Court can collect, that there was any diminution of regard and affection on the part of the deceased to his son, or anything but the most respectful attention on behalf of the son to his father; and it is a question which requires to be minutely investigated and sifted, how it was, under the circumstances in which the deceased was placed with respect to these two branches of the family, that he was led to make this alteration in favour of Mrs. Williams to the prejudice of Mr. W. B. Panton. I have stated, he had confidence to a certain extent in Mr. Williams, but that confidence does not appear to have been unlimited, because it

turns out, upon the answer of Mr. Williams, it was not until after the deceased's death that he heard or knew of Mr. W. B. Panton being in possession of the will of 1828, or of a will of that description. It is certainly an extraordinary circumstance looking at what is said to have taken place, that the deceased when he gave instructions for the will of 1834, and for the codicils of 1836 and 1837, never intimated to Mr. Williams that such a will had been executed by him. It is quite impossible that he could have forgotten that such a will had been executed by him, because that will of 1828 was contained in a considerable number of skins of parchment, was of great length, recited the settlement made on the marriage of his son in 1824, and the disposition of the property in favour of Mr. W. B. Panton, Mrs. Hamilton and Mrs. Williams; and yet it does appear that Mr. Williams was not aware of the existence of the will till after the death of the deceased, who, consequently, had not communicated to him that such papers had been executed. And this gives rise to another observation, that at least, no reason arising from Mr. W. B. Panton's conduct to his father, was assigned as a ground for excluding him and giving the property to Mr. Williams.

The case, then, as to the probability arising from the state of the deceased's affections, certainly does not place Mr. Williams' case upon very high ground. There was a probability that, if the deceased did make any alteration in his testamentary disposition, he would have given a larger portion of his property to Mrs. Williams than she takes under the codicils of 1831 and 1833; but I do not think that

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there was any probability laid for so complete a departure from his original intention as is contained in this will and these codicils now propounded.

On the part of Mr. W. B. Panton, several distinct grounds were alleged of opposition to these papers. It has been stated, that his case was multifarious—that it laid many grounds of opposition which were different and distinct from each other; and it was rather insinuated than urged, that too much indulgence had been given to him in the early part of the proceedings. But it appears to the Court that this was a case, which, from the commencement, necessarily required that the party who opposed such papers as these, who charged fraud in procuring them, and who was so materially prejudiced by the papers, should not be too much confined and restricted in his line of pleading; and accordingly the Court did admit allegations which contained a case, which cannot properly be denominated multifarious, because all of them tend to shew that this was not an act of the testator, made with his full knowledge and privity, but that it was a case of fraud, the particular nature of which, Mr. W. B. Panton, being originally ignorant that such papers were in existence, was altogether unable to discover; and accordingly he did plead in such a manner as to infer that he doubted the signature to the several papers to be that of the deceased; that he to a certain extent impugned the capacity of the deceased—that is, he pleaded inferentially, in this manner; that these papers, so contrary to the whole tenor of the deceased's behaviour towards him, and to the declarations he had made, could not have been obtained from him at a time when

he was in a state of capacity—that he must either have been induced to execute the papers at a time when he was in a state of intoxication, or excited by spirituous liquors or wine. Mr. W. B. Panton also went into circumstances, from which, if they were true as pleaded, it could not be doubted that a fraud had been practised. Amongst other things, he pleaded that two of the subscribing witnesses to the will, Ann Williams and John Williams, could not write at the date of the execution; that the codicil of the 7th of May could not have been executed at the time at which it appears to bear date, for that, in point of fact, Mr. Williams had not been at the deceased's house upon the 7th of May, and the deceased had not quitted his house upon the 7th of May, and consequently that the codicil could not have been executed at Plasgwyn, on that day. But it was objected when that Allegation was given in, that there was no plea from which it could be collected whether it was executed at Plasgwyn or Brynbas, Mr. Williams' residence, or where it was executed; for though it was in the handwriting of Mr. Williams, it might have been transmitted to Plasgwyn by post, and might not have been executed by him in the presence of Mr. Williams; and therefore to plead that it was neither executed at the deceased's, nor at Mr. Williams', and, that Mr. Williams was not at Plasgwyn, was irrelevant. Accordingly, that allegation was altered, by pleading that Mr. Williams, when he visited the deceased, on the 9th of April, had got a severe cold, which confined him to his house, and neither he nor his wife had visited the deceased from the 9th of April till the time of his death, and that no commu-

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nication, by letter or otherwise, passed between them.

Now it certainly turns out, with respect to the latter ground, it is not truly pleaded ; for it is admitted, that, at least upon two occasions, Mr. Williams was at the deceased's house after the 9th of April, and that his wife was there upon the 15th of April ; the deceased having been taken ill upon the Thursday or Friday preceding, Mr. Williams had gone, accompanied by his wife, to Plasgwyn, to call on the deceased ; and that Mrs. Williams, unaccompanied by her husband, had also gone to Plasgwyn on the 24th of May, two days before the deceased's death, and had slept at the house of Mr. O. G. Williams, and was at Plasgwyn on the morning of that day. But with regard to the 7th of May, Mr. Williams expressly pleaded that he was there upon that day ; that the codicil was executed at a time when he and the deceased were alone together in a room called the blue parlor, at Plasgwyn, and on that occasion he was seen on the road, going towards the deceased's house, and afterwards dined at the house of his brother, about three quarters of a mile from Plasgwyn ; and consequently, that there is abundant proof that upon the 7th of May he was at Plasgwyn, and consequently, the codicil might then have been executed. It being averred, specifically, that he was there upon that day, another allegation was given in, pleading that Mr. Williams was not there on that day ; that it was impossible for him to have gone to Plasgwyn, and to have been with the deceased, without being seen by some of the servants or inmates of the house ; that a Mr. Price, comp-

troller of the customs at Beaumaris, was at the house on a visit to Mr. W. B. Panton that day, and was never so far from the house, or so long absent from it, as to leave it possible for any person to have visited the deceased without having been seen by him; that Mr. Williams was in the habit of coming in his phaeton to Plasgwyn; that the road was cut out of the solid rock, and that he could not pass without the carriage being heard, and also, from the situation of the windows, he must have been perceived by the servants, who did not see him. Upon these allegations, contradictory as they are, a vast number of witnesses have been examined. A plan of the house was exhibited; and that plan was pleaded, on the other hand, to be incorrect, and it does turn out that it is not very correctly drawn. A model was brought in, by Mr. Williams, stating the particular site of the house, and the position of the several windows, with reference to the road from his own house to Plasgwyn, from which it would appear it was probable that Mr. Williams might have gone into the house without having been seen by the servants; and there were other circumstances which rendered it probable or possible that such might be the case.

I will first consider what is the state of the case with respect to the two witnesses, who, it was pleaded, were not able to write. It is admitted now, that Ann Williams was capable of writing at that time; it cannot be denied. When the Allegation was originally given in, it struck the Court to be superfluous to plead that she could not write; because, when the depositions came to be opened, it would be seen whether she subscribed

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her signature or not. But it was answered, that she might have been taught to write since, and therefore her capability to write her name to her deposition now, would not be proof that she could at the time at which the will bears date. Now the case turns out to be this : she apparently has signed the will and duplicate, and she also states, that she signed, and her name appears to, a scrap of paper produced, (No. 6), part of a will of May, 1834, and there is abundant evidence to shew that this witness had been at school, where she had been taught to write to a certain extent, and the handwriting of the signature to the will and the signature to the deposition are so much the same, as to make it impossible that it should have been the writing of any other person. But, independently of this, there is this strong fact ; this will was executed in November, 1834, and this witness quitted the service of Mr. Williams in May, 1835, and it does not appear that there had been any communication between her and the persons in the house, till after the death of the deceased, in June, 1837, when she was brought up by Mr. Williams from Carnarvon, for the purpose of being examined as a witness in the cause. Therefore, it is beyond all doubt, that at the date of the will, Ann Williams could write her name, and, therefore, might have written the subscription to the testamentary act which she is stated to have attested ; and, therefore, that part of the fraud imputed to Mr. Williams, it is admitted, is not sustained. But it has been charged against Mr. W. B. Panton and his friends, that this is part of the conspiracy ; that it demonstrates that this was a mere invention and fabrica-

tion, and that witnesses have been suborned by the advisers of Mr. W. B. Panton, to depose to the incapacity of this person to write her name at the time the will bears date; and, therefore, it becomes of importance, with respect to these gentlemen, to consider whether they are liable to such an imputation.

Now, there is one thing to be observed with respect to this witness; with the exception of the signature to the will of May, 1834, and of the signature to her deposition, (which of course was known to none of the persons examined), not a single scrap has been produced in her handwriting; though it does appear by the evidence, (though these documents are not produced) that, upon the day the will bears date, two deeds were executed by the deceased, and attested by this witness. And, in fact, she herself admits, on interrogatory, that, during the whole course of her life, notwithstanding the instruction she received at school, she never wrote or signed a letter to any individual whatever. Therefore, I cannot think that it is a ground to affix on Mr. Rumsey Williams, Mr. Bettis, Mr. Jones, Mr. Spencer, or any other person, a charge of conspiracy, and perjury, and subornation of perjury. I think there was reason to believe the declarations spoken to by many persons, that the witness could not write, though the declaration must be taken with some degree of qualification, namely, that she could not write beyond her name, or had never written a letter. I am not prepared to say, on this part of the case, though the fact is otherwise than has been stated, that the parties are chargeable with fraud and other charges made

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against them. I cannot think that there is any ground for imputing fraud, or conspiracy, or concoction of this part of the story, because the fact turns out that the witness could write, though witnesses swear she declared to them she could not write. And there are persons who saw her in a situation, where writing would have been of importance, and she said she could not write.

With respect to the other witness, John Williams, who is dead, the case is not quite so clear. He was in Mr. Williams's service about this period, and had been for some little time before. He was employed to superintend some labourers who were engaged in different works by Mr. Williams, and to pay them their wages, receiving money from Mr. Williams for that purpose; and his name, subscribed to the will, appears to be not very well written—certainly shewing, though it is stated by many witnesses that he had been at school, and learned to a certain degree to write, that he was not a great proficient. But many witnesses speak to the fact, that he could write. It is somewhat extraordinary, that Ellen Evans, one of the subscribing witnesses to the will, states in her first deposition, (for she has been examined twice), that he was taught to write after he came to Mr. Williams, and she gives a reason for it: Mr. Williams, finding it inconvenient to have a person about him, who was to receive and pay money on his account, and who was not able to write, instructed him, so as to enable him to sign his name to receipts and other papers: other persons depose, that he learned writing at school. Now, with respect to this witness, the same observation applies,

that there is not a single document produced which purports to be in his handwriting, (with one exception, I will presently advert to) except the scrap of paper which purports to be the attestation clause to the will of May, 1834, and the will and duplicate of November in the same year; there is no scrap produced, except a receipt for a certain sum of money paid for hay sold by Mr. Williams to a person named Jones, and there does appear on the receipt the name of "John Williams," pretty much in the same character as that which appears upon the will and duplicate and the other scrap of paper. But the extraordinary part of the case is, that this paper is not pleaded; it is annexed to an interrogatory. The person to whom this money was paid by the John Williams, whose name appears on the paper, is not produced and examined, but this interrogatory is addressed to another person, who knows nothing at all of the circumstances of the case, but only deposes to the fact that a person named Jones, who received the money from John Williams, is in existence; but he knows nothing of John Williams or his writing, and his notion is, he could not write at all. A number of witnesses swear that he could write; that they have frequently seen him write, not only his name, but have seen him enter in a book certain accounts, the demands of the labourers of Mr. Williams for work they had performed, and amongst others, persons employed in cutting turf by Mr. Williams; and there were (as Ellen Evans states), entries of money received once a fortnight for the payment of these men. Elizabeth Evans swears that when Mr. Williams went down from London to fetch her up

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to be examined as a witness upon that part of the Allegation which pleaded the character and death of John Williams, he shewed her a book on the journey to London, which, as she says, being signed both by herself and John Williams, she was enabled to identify as his signature. Yet, strange to say, *that* book, proved to be so lately in the possession of Mr. Williams, is not produced, nor any *other* document to satisfy the Court on the important point that John Williams could write, and did write his name upon more occasions than that of the will and duplicate. But the copy of the entry of his marriage is produced, and that is signed with a mark. His wife swears he could write at that time—she herself is a marks-woman. Two books were produced on the trial at the Central Criminal Court, but it is very extraordinary that these books are not produced here. At the hearing of the cause, the proctor offered to produce the books, but this offer at that late period, of course, was very properly rejected on the other side. Now, if this person was in the habit of writing, and of keeping accounts for Mr. Williams, surely Mr. Williams must have had it in his power to produce some of the documents, more particularly that turf account, which he shewed to the witness who came to town with him to prove the identity of John Williams, who subscribed his name to the will, with that John Williams who kept the accounts. Where there has been not one scrap of paper produced, the fact rests on parol testimony, upon the evidence of the two subscribing witnesses, that he did upon this occasion write his name. This is not the way in which a fact of this kind ought to

be proved; and it being in Mr. Williams' power to produce this book, he ought to have produced it; and, therefore, upon that ground, the Court is not prepared to say that all doubt is removed upon this point, except so far as it may hold it to be so by the evidence of the subscribing witnesses who depose to seeing him write his name on that occasion. I confess that, on reading the deposition of Elizabeth Evans, in chief, the Court was at first very much struck with the manner in which she deposed, when speaking to his identity—for it is a remarkable circumstance, that the handwriting is not pleaded in that Allegation, which she is called to speak to—she says, “I know his handwriting very well, because he used to make the ‘I,’ for his christian name, in a peculiar manner, with three strokes through it;” and so it appears upon the instrument propounded. But when I came to read this interrogatory, and found that Mr. Williams, on his way up to town, had produced a book, and asked her if she knew the writing there, her name and that of John Williams, the whole effect of what is stated in the deposition in chief was lost to me, because, having her memory so refreshed, she was not speaking from recollection, but from the exhibition of this book. Therefore, in reference to this part of the case, the Court is not able to say that the doubt is removed; if it is removed at all, it must be by the witnesses who attested the execution of the will, and who depose to having seen him write on that occasion.

But upon this part of the case, there is no ground on which the Court can presume that it is a mere invention and fabrication; and that there were no

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grounds for the belief that this person could not write, arising from his own declarations and conduct. Why a number of receipts are produced for money paid for work done by John Williams; receipts for dividends paid on a bankrupt's estate, all signed by a mark, as if he had been a person who could not write. Although it may be true that he might have been capable of writing his name, and yet might not choose to take the trouble, and, therefore, preferred making a mark; still, when all these instances are produced of his having signed with a mark, those who depose that he was not able to write, may so depose from a sincere conviction of its truth.

Having disposed of these two points, the next is, that of the absence or presence of Mr. Williams at Plasgwyn, upon the 7th of May, the day on which the last codicil is alleged to have been executed. This codicil, perhaps, is not of very material importance, as matters have turned out; but it might have had a very material bearing upon the case. The only ground upon which a codicil was required at this time, was to give a legacy of 20*l.* to Jane Thomas, the deceased's upper housemaid—a legacy of no great amount, of no great moment; an act which the deceased might have done without having recourse to the professional assistance of Mr. Williams, (who is both a solicitor and a proctor); he might have drawn a codicil with his own hand, to give 20*l.* to a servant. It is the more extraordinary, as it appears by one of the papers produced, and which bears date June, 1836, that the amount of the legacy to be given to this upper housemaid was to form a subject for future

consideration ; it is expressly so mentioned at the bottom of one of these papers, that it was to be a subject for future consideration ; and yet so important, so momentous was the legacy to this housemaid considered, that when the codicil of October, 1836, was executed, the deceased had not even then made up his mind as to the amount, and it is not till this 9th of April, (according to Mr. Williams) that he had made up his mind to give her 20*l*. Then, Mr. Williams pleads, (of which there could be no proof), that, upon the 9th of April, the deceased directed him to draw up a codicil to give her 20*l*., and to bring it over at his next visit, and that was, according to Mr. Williams, the 7th of May. He was prevented from calling on the deceased by the state of the weather, or by other circumstances, and between the 9th of April and the 7th of May, no intercourse took place between them, except by letter, but no letters have been produced, which, I think, would have been, if any had passed with reference to this codicil. However, upon the 7th of May, it seems that Mr. Williams, according to his plea, visits the deceased ; that the door of the house being capable of being opened from the outside as well as the inside, he admitted himself to the house without disturbing any of the servants ; that he saw the deceased in the blue parlor, and then and there the codicil is executed—not drawn, because the codicil is brought ready prepared for execution, with the exception of the insertion of the date ; and so careful is Mr. Williams that there shall be no possibility of this testamentary act being discovered by any of the persons about the deceased, that he

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takes his own inkstand with him, (as appears from the evidence of Grace Jones), and this is one of the proofs that the visit took place. Therefore, this is a matter done clandestinely, as, indeed, the whole of the proceedings have been with respect to these testamentary acts. No person is present but Mr. Williams and the deceased. This codicil not only gives a legacy of 20*l.* to the servant, but it also confirms expressly, and by reference to the date, the will of 1834; and, therefore, might have been a very material document with reference to certain circumstances alleged to have taken place on the 4th and 12th of May. The great object is, apparently, to carry down the intention of the deceased till the date of the codicil itself, and it might have recognised the will as an operative will so late as the 7th of May, 1837, thereby amounting to a republication of the will on that day, and so have superseded any intermediate act done by the testator between the date of the last codicil and the 7th of May. And that seems to have weighed upon the mind of Mr. O. G. Williams, the brother, because he says, "there may be a will of later date than yours; therefore, I advise you not to claim your rights as executor; till the will is produced, you will not be competent to assert your right as executor, without producing the documents on which the right exists, these are with your bankers in London; though you have these, carrying it down to the 7th of May, and the deceased died on the 26th, it is not impossible that another will may have been executed in the meantime. Do not produce this codicil till you know the date of the latest codicil in the hands of Mr.

W. B. Panton." But Mr. O. G. Williams had no power to act for his brother, as to a later will, until he had specific instructions for that purpose; and his brother had left Carnarvon on the 9th of June, or a day or two afterwards; and when, upon the 9th of June, Mr. O. G. Williams is informed of the date and contents of the will, and of the dates of the codicils, that they are anterior to that of the 7th of May, he did not feel himself, I presume, authorized to state that his brother was named executor by the will of 1834, confirmed by the codicil of the 7th of May, of which he was apprised by Mr. Thomas Williams. However, so it is, whatever the reason may have been, nothing is said of the existence of the codicil.

Now it does seem to me a question of importance whether Mr. Williams was or was not at Plasgywn on the 7th of May. Originally, it was pleaded generally that the will was executed on that day—in whose presence, or where, was not stated. The general averment, in answer, was, that Mr. Williams had not been there, and had had no communication with the deceased between the 9th of April and the time of his death; and two witnesses have deposed to their belief that he was not there after the 9th of April. They are certainly not correct in so stating, because it is admitted that, on the 15th of May, Mr. Williams was there. But the 7th of May is pleaded afterwards as the day he was there; and Mr. Williams has produced a great number of witnesses, who depose to their perfect recollection of the day, as that on which he was seen on his way to Plasgywn, and to the fact of his having dined with his brother on that day,

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after having been at Plasgwyn ; and the evidence, undoubtedly, is very strong on this point. Mr. O. G. Williams is a clergyman, who resides in the parish adjoining that in which Plasgwyn is situated, at a distance of three quarters of a mile. He says, that, upon that day, his brother, unaccompanied by Mrs. Williams, came to him from Plasgwyn, and dined there, and he perfectly recollects the day—it was the Sunday before Whitsunday, two days before the deceased was taken ill, of which he informed his brother on the 15th. Miss Morris, a companion of Mrs. O. G. Williams, deposes to this fact, and her recollection of the day is founded on the fact of Mr. Williams having that day seen his brother's wife seated in a Bath chair, which he had sent from London for her use ; and the evidence of witnesses, in that situation of life, is, undoubtedly, entitled to considerable weight. Mr. Williams has also produced Thomas Owen, his coachman, who drove him, and though he is a witness not to be relied upon, since he deposes as to the day of the week, not to the day of the month ; he says it was the Sunday before Whitsunday, a circumstance which seems to have impressed itself on the mind and memory of every witness examined in the cause. Mr. Williams has produced other witnesses, who say that, on that day, they saw him on the road, and in the neighbourhood ; and the only question seems to be, whether the witnesses on the one side or the other have deposed accurately as to their recollection of the precise date. Now, they are examined after an interval of two years from the date of this transaction. The Allegation was not given in till after the trial at the Central Criminal

Court; therefore, it is possible that the witnesses on both sides may have deposed inaccurately as to their recollection; and it is difficult, therefore, for the Court to determine between them and witnesses who depose with equal confidence as to their belief that Mr. Williams was not there; I say it is difficult to decide upon which side the truth lies, where both, intending perhaps to speak accurately, may not have retained a sufficient recollection to depose with certainty as to the day on which the transactions took place. Mr. Williams was seen by persons, who depose to that fact, upon the road to Plasgwyn; and one person, who states himself to have been in a public-house near to the entrance to Plasgwyn, states that he saw Mr. Williams, both in the morning and in the afternoon of that day returning from Plasgwyn to Brynbas, having been to dine with his brother. On the other hand, there are a number of witnesses who depose with equal confidence that Mr. Williams was not there. Amongst the witnesses produced, to the number of ten, to prove that Mr. Williams was not there, is a gentleman of the name of Price. He states that he was in the habit of going to Plasgwyn, for the last months of the deceased's life, on Saturday, remaining over Sunday, and going back to Beaumaris on Monday morning; and he has deposed, that, on that day, it was proposed that he and Mr. W. B. Panton should ride to Penrhos, the residence of Mr. Rumsey Williams, the father-in-law of Mr. W. B. Panton; but, in consequence of the rain, they were unable to go, and remained at Plasgwyn during the whole day; and he believes that it was utterly impossible that Mr. Williams could be

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there without his knowledge, though he was occasionally absent from the house during the morning. Witnesses depose to the state of the weather, and on both sides, they agree, that though the morning was rainy and showery, it cleared up in the middle of the day. Hugh Evans, the huntsman, deposes that the morning was extremely wet; that a pony was borrowed for Mr. Price to accompany Mr. W. B. Panton on a ride to Penrhos; that it cleared up about twelve o'clock, and some little time before that they started on their journey. He states that Mr. W. B. Panton swore at the rain; and he says he thought, when he heard a few days afterwards that the old gentleman was taken ill, it was a judgment on Mr. B. Panton for the way he expressed himself on the occasion. Many others depose to the state of the weather that morning; some say they were prevented from going to church; and others, that they did go to church. The great doubt is, as to the borrowing of this pony, which Mr. Price was to ride. Hugh Evans states that he went to borrow the pony, the Sunday before Whitsunday, and that he borrowed it of a person named Jones. Mr. Jones has been examined on the other side; he says it is very true the pony was borrowed; but, in consequence of the state of the weather, the ride was given up, and the pony was returned between twelve and one or two o'clock that day. But there is a witness on whom the Court is inclined to place great reliance, John Owens, a preacher in the Wesleyan connexion, who fixes the day by reference to his notes and memorandums of the places at which he preached, and by a paper

shewing the tour of preaching to be observed by the members of that persuasion. He identifies the day on which he saw Mr. W. B. Panton and Mr. Price, near the Menai-bridge, (within four miles) between twelve and two o'clock. Now, this witness, speaking from a memorandum, says he saw Mr. Price and Mr. W. B. Panton on horseback on that day, near the Menai-bridge. Looking at all the circumstances of the case, the inclination of my mind is, that Mr. Williams was at Plasgwyn on that day, rather than the contrary. I think, that Mr. Williams might be there without being seen by the servants, because, about this period of time, the servants assembled at dinner—about one o'clock. One witness says she saw him come to the house that day; but the Court can place no reliance upon her, she being the person for whose benefit the codicil was executed; and yet she had a better opportunity of seeing him than the other servants, who were in the servants' hall, at dinner; whereas she was attending upon a superannuated nurse. She says she saw Mr. Williams going towards the blue parlor, which was usually occupied as a sitting-room by her master, and this witness does not take upon herself to depose positively as to the day on which she saw Mr. Williams there, but states it to have been a few days before the deceased was taken ill, of which illness he afterwards died. Therefore, I think, taking all the circumstances together, the evidence is rather that Mr. Williams was at Plasgwyn than that he was not, and that is the utmost length to which the Court can go; because, though it is possible that the codicil might have been executed in the pre-

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sence of Mr. Williams, yet there is no evidence to shew that it was executed at that time.

These three points of the case are therefore disposed of, and I think on these three points, fraud has not been established. It has not been established that Ann Williams could not write; it has not been clearly established that John Williams could not write; it has not been established, (I think the evidence is rather the other way) that Mr. Williams was not at Plasgwyn that day.

The probability is, as I have said, contrary to the act propounded by Mr. Williams. The probability is, that, although the deceased was, to a certain degree, eccentric, and prone to take offence with his children, (perhaps without sufficient cause) yet, as far as the Court is able to trace, there were some of his own children with whom he continued to be on terms of affection, and it is probable that they would be partakers of that large benefit to be derived from the diminution of other branches of his family; and there is no reason to suppose that the deceased was of that temper and disposition to take away the whole of his personal property from that son whom I must consider to have been a great favourite, if not the favourite child, to give it to another person not connected with him by blood, though married to his daughter, and who, upon the death of his daughter, (there being no family, and they had been married, at the date of the will, six years, and at the date of the codicil of 1837, nine years, without any family) would have had the bulk, to transmit in any other channel he might choose; there was no provision for the separate use of his wife, but upon her death this

became the sole property of Mr. Williams, to be disposed of as he might think proper.

The remaining part of the evidence in this stage of the case is that obtained from the subscribing witnesses, Ellen Evans and Ann Williams. These persons were both in the service of Mr. Williams. Ellen Evans appears to be a person of a somewhat superior description; Ann Williams is of rather a low description. But is the account these witnesses have given credible in itself? It is consistent, not with probability, but in the details of the circumstances? Are the witnesses consistent with themselves and each other, and have they been consistent in the declarations they have made, and the accounts they have given, at various times upon the subject? It will be necessary for the Court to advert to this part of the evidence rather more in detail, than with respect to the other parts, because, in the other parts, it is not necessary, in the view the Court takes of the case, to examine with great minuteness the evidence of the witnesses in detail; but, where an act sets out with great improbability on the face of it, the Court is bound to look very carefully at the account given by the witnesses who were present at the transaction.

Now Ellen Evans says, "I witnessed the signing of several papers by the deceased. To my recollection, he never paid a visit to Brynbras Castle in my time, that I was not called upon by Mr. Williams, my master, to be a witness to the signing of some paper or other by him." It seems, therefore, that Mr. Williams was transacting business for the deceased which required his signature, and that signature to be attested by a witness. She did not know

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the contents of any of the papers she witnessed. She says, "I witnessed a will for Mr. Panton, whilst he was staying at Brynbras Castle, in May, 1834." With respect to that will, the only information the Court has, is from this witness and Ann Williams, and the production of a scrap of paper, (No. 6), upon which there is an attestation-clause, and the name of the two witnesses and John Williams subscribed. What were the contents of that paper the Court has no evidence. It was executed May 31st, 1834, and that paper is pleaded to have been destroyed at the time when the will of November, 1834, was executed. She says, "I witnessed another will for him, the will in question in this cause, whilst he was staying there, in the latter part of the same year." It has been proved that the deceased was in the habit of visiting Mr. Williams at Brynbras Castle, in the spring and autumn of each year. I should have observed, with respect to the will of May, 1834, that there is a letter in the handwriting of the deceased, addressed to Mr. Williams, in which he requests him to go over to Plasgwyn, with reference to the settlement made on his son's marriage, and with which he appears to have been extremely dissatisfied, when he found, after the death of his son, that his interest was confined to a life interest in the property; and he wrote to Mr. Williams, desiring him to go to Plasgwyn, and he would show him how he had been robbed by the person whose daughter his son had married, and by other persons who were concerned in the preparation of that instrument; that he had been robbed by the widow of his eldest son. That is pleaded as leading up to the execution of the will of 1834, though I

confess it does not appear very clearly to my mind how it should have that effect, it being only in reference to the property subject to settlement, which is not referred to in the will of November, 1834, further than this—he gives to Mr: Paul Griffith Panton all his estates in Anglesey, among which was the estate of Plasgwyn, where the deceased resided. But there is that letter of the deceased to Mr. Williams, which shews that he was in communication with him, and with reference to the settlement he had made, and which, it appears, he had declared his intention to endeavour to set aside by an application to a Court of Equity. Evans states, “there were two copies signed of this last mentioned will; the one on the Thursday, and the other on the Friday,” that is, the 6th and 7th, the papers themselves being both dated the 6th, though the duplicate was executed on the 7th. She says, “John Williams, who is now dead, but who then acted as bailiff to Mr. Williams, and Ann Williams, the then housemaid, were present, and witnessed the signing of these last wills, as well as myself. On the occasion of the signing the first of the two wills, we were called up by my master into his small sitting room up stairs, where he and Mr. Panton were alone together. We neither of us knew for what purpose we were called up, further than that, an hour or so before, my master told us to be in readiness, that he should want us to witness Mr. Panton’s signing a paper. He did not say what the paper was, nor did we know that it was Mr. Panton’s will, till Mr. Panton, at the time of signing it, declared it to be so.”

‘It was just after kitchen dinner, about two o’clock

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in the afternoon, when my master called us up into his room, for the purpose he had mentioned. On our entering the room, we found Mr. Panton, the deceased, sitting in the arm chair, at the round table, in the middle of the room, looking at the paper, the will of which I am deposing, which he held in his hand." Therefore, supposing this account to be true, the deceased read the will, and there is not only the execution of the will, but a knowledge of the contents; at least, it would be his own fault if he did not know what the contents were. "Mr. Williams then proceeded to tell us that Mr. Panton wished us to be present to see him sign a paper. My master said this in Mr. Panton's hearing. He spoke the words first in English, and then repeated them to John Williams and Ann Williams in the Welsh language; he repeated the words to them in Welsh, apparently to make sure that they understood what he said. They, both of them, understood Welsh better than English, though they were in the habit of speaking and understood the English language very well. I do not remember that Mr. Panton himself then made any observations, but upon my master saying what I have stated, he (Mr. Panton) put the paper (the will) down on the table before him, and proceeded to sign it. My master handed the inkstand, which was on the table, towards him, and he, (Mr. Panton), of his own accord, took a pen and signed his name, 'Jones Panton,' at the bottom of the will, opposite to the impression of a seal, in red sealing-wax, which was already affixed to the will. Before signing his name, Mr. Panton inquired of my master where he was to sign the will; he pointed to the

place where he afterwards signed his name, and said to my master, in a tone of inquiry, 'Here?' and upon my master telling him 'Yes, that was the place,' he signed his name there. John Williams, Ann Williams, and myself, stood close by him at the table as he signed the will, as did also my master. Mr. Panton then, by direction of my master, put his finger on the seal, and repeated after his words, some words to this purport:—'I deliver this my last will and testament.' When Mr. Panton had thus signed and sealed the will, my master took it up and carried it to another table in the room, at which I and the other two witnesses, John Williams and Ann Williams, under my master's direction, all signed our names to it.

"Mr. Panton, after he had signed the will, got up from the table where he had done so, and came to the table where we were signing, and stood by, looking on whilst we signed. I signed first, than Ann Williams, and lastly John Williams. Directly John Williams had signed, my master told us he had done with us, and that we might go; and as we were leaving the room, he told us not to mention what we had been doing; that Mr. Panton did not wish us to be talking about it. He said this in Mr. Panton's hearing." So this was to be a secret kept from the knowledge of any person but themselves; and certainly it does appear to have been very completely kept, for no person seems to have had a knowledge of the existence of these papers until after Mr. Williams came to London and obtained them from his bankers. And I must here observe, that Mr. Williams must not be surprised if suspicions and jealousies should have been excited by his

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acquiring so large a portion of the deceased's property in a secret and clandestine manner. He is the party to blame for the suspicion, if it be unjust, from the clandestine manner in which he has been the agent in transferring so large a portion of the deceased's property to himself, from Mr. W. B. Panton. The witness says: "when we had signed the will, my master took it up from the table, and it was in his hand when we left the room. We were in the room, I dare say, as much as ten minutes. Mr. Panton, by his manner, seemed to be pleased and satisfied with what was going on throughout the execution of the will, but he took no further part in it than what I have stated. He signed and executed the will just in the same way as he did all the other papers I ever saw him sign—quite of his own accord. I have no doubt of his knowing the contents of the will at the time he so signed it, for he had it in his hand and was reading it at the time we entered the room. The will was written upon a sheet of paper of the same description as that upon which my evidence is being taken, only it appeared to be opened wide, and not folded in the same way." In point of fact, the paper, being open, as she describes, is written across from one side to the other, so that the fold is perpendicular and not horizontal. "I did not read the will any more than I did any other paper I witnessed of Mr. Panton's; and except as Mr. Panton delivered it as his last will and testament, I should not have known it to be a will. I remember that, at the time I was about to sign it, I cast my eyes over it, and my master, seeing me looking at its contents, put the blotting-paper over it, to prevent my reading it. I did not

see any other papers about besides the will which was signed. After breakfast, on the following Friday morning, between ten and eleven o'clock, my master called me and John Williams and Ann Williams into one of the sitting-rooms, and Mr. Panton then, in our presence, signed another paper, being, as I believe, a copy or duplicate of the will which he had signed in our presence the day before. I think that it was in the breakfast room down stairs. Mr. Panton, the deceased, being about that day to return home, he having gone from Plasgwyn to Brynbras Castle in Mr. Williams' carriage, and not accompanied by his own servant, and returning in the same manner, accompanied by Mr. Williams, or Mr. and Mrs. Williams. All the same forms were gone through on this occasion as on the day before. Mr. Panton, in the presence of John Williams, Ann Williams, and myself, signed his name at the foot of the paper, and put his hand on the seal, and repeated after my master the words, "that he delivered the paper as his last will and testament." She then goes on to identify the papers produced to her as executed on the 6th and 7th of November, and states that both of them are in the handwriting of Mr. Williams. The account she gives upon the interrogatories does not, as it seems to me, vary in any of the particulars from her deposition in chief, as to the manner in which the execution took place. After having spoken of the execution of the codicil of October, 1836, she states that, in the beginning of 1837, the papers were deposited by her, by Mr. Williams' direction, at Messrs. Childs, the bankers, (not the bankers of the deceased, which was the natural place they should

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be taken to, but the bankers of Mr. Williams); and not only the will was there deposited, but the duplicate and the several papers annexed to Mr. Williams' affidavit as to scripts. The parcel lay at Messrs. Childs till it was received from the bankers after the deceased's death. Therefore, whatever was the state and condition of the papers in the years 1834, 1835, and 1836, or rather, when she says she took them there in the beginning of the year 1837, they remained in that state till they were taken out of the bankers' hands, and out of the case in which they were enclosed by Mr. Williams; for no access could be had to them without the knowledge of the bankers; and it is not suggested that they had been removed, or the deposit had been meddled with, in the intermediate time.

This witness had stated, with respect to John Williams, that he had been taught to write in the service of Mr. Williams, and she certainly does depose, upon her first examination, in a very strong and particular manner as to that fact. She says, "I cannot say that I know of the said John Williams having ever written or signed his name to any letter to any one; to my knowledge, I never saw him write but on three occasions, and those were the times when he signed, as a witness with me, the three different wills of Mr. Pantton's to which I have referred in my evidence." He could only write his name. He was taught to do so by my master, at the time we went first to live at Brynbras. My master found it inconvenient that John Williams could not sign receipts or bills for hay and that, and he himself wrote John Williams' name for him to copy, to learn him to do it. I

remember that well, and that John Williams used to be writing his name on the stable-door and about, in chalk, till he had learned how to do it; it was very soon after we went to Brynbras, that my master taught him how to write his name. I have no doubt that John Williams signed his mark to the entry of his marriage, because, to my knowledge, it was not till after he was married that he learned to write his name." This throws some discredit on that part of the case, which witnesses are called to prove, namely, that he had learnt to write at school, that he could write at the time he was married, and that he was able to keep books with respect to labourers employed by Mr. Williams.

This witness has been examined a second time, after the trial at the Old Bailey, and she there certainly does vary, in some respect, as to the ability of this person to write. She says, upon the interrogatory: "I never saw him write anything but his name, and the names of the different work-people who were employed at Brynbras. He used to pay them their wages every fortnight, and keep the account of the time they worked. I have often seen him putting down on paper and in a book the names of the workmen, with the amount of the wages due to each; and I have often seen him sign the paper containing the account of the money which the producent gave him once a fortnight to pay the men's wages. I have taught him to write at times. I used to teach him to write his name better than he did, and to make capital letters; for he was always very wishful to be able to write better. I do not know that he was taught to write whilst in the producent's service. He certainly

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could write his name when I first knew him. I did not know where he learned to write until the time of the trial, but since then, I have heard that he had been at school at Bangor, where he had been taught." This witness, in her second examination, seems to differ from the account originally given by her on this point, and it is possible her recollection may have been drawn to the fact from the circumstance of having known what was deposed to by persons who were at school with him at the time when he learned to write.

The other witness to the will is Ann Williams, and she states herself to have been in the service of Mr. Williams on two occasions; from the 12th of May, 1834, to the 12th of May following, and for three months, in the year 1832. She says, "I was present when Mr. Panton signed papers as his will at Brynbras; three times I was present when he signed—once when he was on the first visit there, in May, 1834, about a fortnight after I went to live at Brynbras; the others on two following days, whilst he was on the second visit to Brynbras, in November in the same year. I don't remember in what part of the month, but I know it was in November, for my master and mistress left Brynbras and went to town a few days after, and I was left behind. I did not know what the contents of the wills were; I only knew them to be wills, because Mr. Panton signed them as such. Of the two wills, which were signed in November, one was signed just after kitchen dinner, the other next morning, just after breakfast, just before master and mistress went out in the carriage. On the occasion of the signing of the first of the two last

wills, (those signed in November), Mr. Williams, my master, called me, and Ellen Evans, and John Williams, up stairs into the sitting-room there. We did not exactly know for what purpose we were wanted, only we thought it was for the purpose of seeing Mr. Panton sign some paper, as my master had that morning told Ellen (Ellen Evans), and me, and John Williams also, I believe, that he should want us in the course of the morning to come up to Mr. Panton. When my master called us up into the said sitting-room, we found Mr. Panton there alone with him. Mr. Panton was sitting at a large table, in the middle of the room, with several papers before him. I think he was writing, but what I don't know, unless it was the papers we signed; my recollection at this distance of time is not very distinct as to that. I remember that we then stood by the table, and Mr. Panton wrote his name to a paper before him—it was a large sheet of paper, and he wrote his name, 'Jones Panton,' in one corner of it. There were, I think, several other papers before Mr. Panton, but what they were I did not know. I don't remember that anything was said before Mr. Panton signed his name to the said paper. There was a large seal on the paper, and Mr. Panton, after he had written his name, put his hand on the seal, and said, he delivered the paper as his last will and testament, 'I deliver this as my last will and testament,' he said. I perfectly remember his using those words. To the best of my recollection, my master repeated them after him, in order that we might all understand them; for Mr. Panton was a very old gentleman, and, like other old people, he did not speak

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very distinctly ; but I heard what he had said well enough. He signed the will and spoke the said words quite of his own accord. I don't remember that my master told him what to do. There was pen and ink before him on the table, but I think my master pushed it a little nearer to him when he signed ; my master did not assist him in any other respect. When Mr. Panton had signed, my master took up the paper, and brought it to the side table. He then, in Mr. Panton's hearing, told us that Mr. Panton requested us to be witnesses to that paper. He repeated these words, I remember, both in English and Welsh ; he said them in Welsh also, because John Williams and I understood Welsh better than English ; I understood English pretty well then, but not so much of it as I do now ; John Williams only understood it a little. Ellen Evans signed her name first, then, I think, it was I who signed next, and then John Williams signed his. Nothing was said whilst we were signing our names, but my master shewed us where we were to sign ; and when we had all three signed, and we were about to leave the room, he told us not to talk about what we had been doing ; that we were not to mention it to anybody. We then left the room. I will not be positive whether it was on this or the following morning, but, on one of the two occasions, I recollect that, after the will was signed and witnessed, there was another paper signed, a larger paper than the will, a good deal larger. I do not recollect very particularly what passed about the signing this second paper, but to the best of my recollection, Mr. Panton returned to the table in the middle of the

room and signed the larger paper, and then it was signed by the others. My master, I remember, signed it for one, and Ellen Evans also, but I can't be sure whether I signed it or not—I could not tell unless I was to see the paper. I don't recollect that Mr. Panton signed this larger paper also as his last will and testament. My master, I remember, said that he would write his name to that—the larger paper, but not to the first—the will." And it does appear by the evidence of Mr. Boys, taken upon a subsequent Allegation, that Ann Williams, Ellen Evans, and Mr. Williams had attested the execution of a deed for the partition of the London estates upon the morning of the day on which this will was executed; but these papers are not produced. "My master also, to the best of my recollection, repeated the words after him the same as he had done the day before. He then took the paper to the side table, and said, as before, that Mr. Panton wished us to witness the paper. I only know that Mr. Panton delivered it as his last will and testament; whether it was a copy of the paper we signed on the day before, I did not hear. It was signed in the corner by Mr. Panton, like the one the day before. I think that one of the two, but I don't recollect which it was, was rather larger than the other, but like it in other respects."

Therefore, from the evidence of these witnesses, supposing they are to be credited, there can be no doubt that the deceased not only executed the paper as his last will, but knew, or had an opportunity of knowing, the contents of the instrument; there is the evidence of these two persons, speaking most positively to all that is material to the fact of

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the execution ; and that evidence is met only by the evidence which arises out of the strong improbability against the deceased having executed that act, knowingly and willingly, with a full knowledge of its contents. If these two witnesses are to be believed, there is an end of the case, so far as the Court has hitherto gone ; and the question will be hereafter, when it comes to consider the whole of the circumstances together, whether their evidence is sufficient, as given in the first instance, shortly after the death of the deceased, for he died in May, 1837, and these witnesses are examined in September—though Mr. Williams, (rather an extraordinary step before it was known whether the will would be opposed or not) brings these subscribing witnesses up to London, and keeps them after the Allegation was given in, after the examination of witnesses had been commenced, though under suspension ; it has been suggested, in argument, that he thought it right to keep Ann Williams, who was no longer in his service, from being tampered with or attempted to be influenced by other persons.

The next part of the case, and the last part to which the Court will have occasion to refer, is that extraordinary circumstance with respect to the alleged discovery of certain pencil-marks on these papers, which, it was pleaded, were, at the time of the discovery, to be traced upon them with the assistance of a strong light, by magnifying glasses of great power. It is pleaded that particular witnesses were able to trace certain pencil-marks, from which it is collected that, when the deceased signed his name to the papers, they did not bear a

testamentary character; that they were, in fact, plans and maps of that property possessed by the deceased jointly with Mr. Brook Baines Hurlock, in different parts of this town, and with respect to which there had been negotiations for a partition, as early as 1832, and which was not finally executed till November, 1834, when the deed of partition was executed. Now, this is a part of the case in which the Court has felt very much the circumstances under which it has been produced; because, as it was alleged on the one side that these papers, when signed by the deceased, were merely maps or plans of houses, or leases, or agreements for leases, in pencil, to which his name had been signed in ink; and it is alleged that, in a late period of the proceedings, namely, after the close of the commission for the examination of witnesses, or shortly before, these marks were discovered on the papers, the existence of which at the present time is admitted on all hands, it does seem to imply, possibly, that there has been some negligence in the care and custody of these papers, if the marks have been impressed upon them, since they were delivered into the Registry, and the Court has looked with a great deal of anxiety, in order to trace out, if it possibly could, the time at which the marks were impressed on the papers; if they were not on them when the signature of the deceased was obtained to them, it is a case which may involve very seriously the character of persons in this profession. I have looked anxiously into the depositions on both sides, with respect to these papers, as to their state and condition when they first came into the Registry of this Court; and for

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the purpose of discovering, if they had not these marks upon them at the time when they were brought into the Registry, at what time after that they could possibly have been impressed upon them.

Now the additional articles were admitted in the summer of 1838, and fac-simile copies of the papers, with these pencil-marks upon them, were annexed to that Allegation; but the Court was of opinion, that the witnesses to be examined on that allegation ought not to come prepared with the exhibits annexed to the allegation, to state what marks they were able to discover; but, having examined the papers previously, they were to come and depose to what they had been able to decypher. Therefore, it was a mere plea of the facts, what the papers were, without specifying the particular marks upon them.

Now three persons have been examined, who have been accustomed to decyphering hands, and to make out obscure and nearly unintelligible writing, and they do depose to certain marks, which they have been able, by the assistance to which I have alluded, to discover on these instruments, which shew that the marks themselves were evidently those of maps, or plans, or agreements for leases, and they also depose, that, in many instances, they are able to trace the ink-writing over the pencil-marks. I have no doubt they are speaking that which they believe to be the real state of the facts, when they state that the pencil-marks were first impressed on the paper; that, though there had been attempts to obliterate the pencil-writing, sufficient remains upon them to enable them to depose in the manner they state. But the Court would not

place too much reliance on evidence of this description, for it is liable to this objection ; that the persons come to give evidence, having been impressed with a notion that they have come to detect a fraud ; and it does appear, that some of the witnesses were impressed with that notion. They had been examined, before they were examined here, at the Old Bailey ; they had given evidence there, and the Court must receive it here ; but it must be careful not to place too much reliance, on a case of this description, upon the evidence of such an inspection as these gentlemen have given to these papers.

Now, it appears, that, in 1822, the deceased came into possession of property in different parts of the town, some in Cursitor-street, some in Castle-street, some in Devonshire-street, and some in Cavendish-court, jointly with Mr. Brook Baines Hurlock, under the will of Mrs. Mathews ; and some disagreement, as to the letting of leases of these houses, subsisted between him and Mr. Hurlock. The result of the evidence is, that Mr. Panton having proposed to let a lease of some part, or the whole, of the property, it was objected to by Mr. Hurlock, for the purpose of inducing Mr. Panton to consent to a partition, and that negotiations for the partition of the property were going on, commencing in 1832, and finally arranged in 1834, when a deed of partition was executed upon the 6th of November, the day on which the original will, propounded was executed. Now I take the evidence of Mr. Boys, who was examined on the part of Mr. Williams, after these additional articles had been given in, but not with reference to them. He was a clerk in the house of Messrs. Forbes and Hale, who were employed on

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behalf of Mr. Hurlock, and who were also advised or conferred with upon the part of Mr. Panton, through the agency of Mr. Williams. He states : “ The matters transacted in our office, relative to the allotment or partition of the premises of which the deceased and Mr. Hurlock were the tenants in common, were all within my knowledge, and, in a great measure, under my general superintendence. It was on the 2nd of August, 1834, that the allotment or partition of the premises was made by the referees appointed for the purpose, on behalf of the respective parties. The deed for carrying such partition into effect was prepared by us, acting for both parties, a few months afterwards. It was ready for execution in the October following, it having been previously settled and approved of by the producent (Mr. Williams) on the part of the deceased. The property, the subject of the partition, consisted of the following premises, all freehold, and in London —two houses, being Nos. 12 and 13, in Cursitor-street, in the parish of Saint Andrew, Holborn ; two houses, being No. 24 and 25, in Castle-street, in the same parish ; two houses in Norwich-court, in the same parish, being No. 1 and No. 2 ; also eight houses, being Nos. 2 to No. 9, in Devonshire street, Bishopsgate-street ; also a piece of ground in Cursitor-street, on which two other houses formerly stood, and another piece of ground in Cavendish-court, the site also of two houses which had been pulled down. I cannot state of my own knowledge when it was that the management of the interest of the deceased, in the aforesaid premises in London, was first entrusted to the producent. I only know that he put the matters relating to them into our

hands at the end of 1832, or in the following January, and that the first thing we had to do, in respect to them, was to obtain a settlement of accounts from the party who it appeared had previously collected the rents for the deceased. No map or plan, nor copy of any map or plan, of the premises partitioned between Mr. Hurlock and the deceased, or any part thereof, was, at any time, to my knowledge, made or prepared by the producent or any other person, or signed by the deceased, with the privity or within the knowledge of the producent, or otherwise. So far as we were concerned, everything was done in the matter of the partition without any plan or map whatever. The premises were partitioned by two referees or arbitrators, named for the purpose—the one on behalf of the deceased, and the other on behalf of Mr. Hurlock. The premises were not partitioned according to any agreement for the partition or division thereof between the deceased and Mr. Hurlock. An agreement had been previously entered into between the parties, binding them to abide by such allotment as the referees might make of the premises; and, pursuant to the agreement, the referees partitioned the premises into two separate allotments, and such allotments were drawn by lot, either by Mr. Forbes, my partner, and the producent, who were present; the producent on the part of the deceased, and Mr. Forbes on the part of Mr. Hurlock; or else by the respective referees, in their presence. I was myself in and out of the room on the occasion, and, to the best of my recollection, I was present when the allotments were drawn. The whole transaction, however, passed

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within my knowledge. The allotment or partition of the said premises, as so drawn, was thereupon compulsory upon the deceased, and did not in any way require or, to my knowledge, at any time have, the sanction of his signature thereto :” it having been pleaded that the deceased had signed the papers with pencil to signify his assent to them, for the partition between himself and Mr. Hurlock ; and it is true that the partition was afterwards made in the manner here described, though it will presently appear that there were negotiations for the division of the property between the parties, and which might therefore possibly require the sanction of the deceased, as supposed, though finally he signed an agreement to abide by the decision of the referees.

He goes on, in answer to an interrogatory to say : “ Mr. Hurlock did not, to the best of my recollection, in September, 1832, or at any other period, object to join in granting leases of the houses, or of any of the houses, in Devonshire-street, either on the ground suggested in the interrogatory, namely, until the said property was divided, or any other ground. To the best of my recollection, there never were any leases prepared or suggested of the houses in Devonshire-street. A negotiation was entered into, whilst I was in the employ of Messrs. Forbes and Hale, between the producent, on behalf of the deceased, and Messrs. Forbes and Hale, as the solicitors of Mr. Hurlock, for the partition of the property. To the best of my recollection, the negotiation was depending some months at the end of the year 1833, and the commencement of 1834 ; it may possibly have been commenced in 1832. Mr.

Curtis was instructed to make an estimate of the relative value of the property, with a view to effect such partition. To the best of my belief, it was in 1833 that he was employed so to do ; but at what period of the year, whether in or about the month of April, I am not aware. Mr. Curtis did make his report thereon in or about the month of June, 1833. The producent did not, to my knowledge, in or about July, 1833, write, address, and send a letter to Messrs. Forbes and Hale, proposing on behalf of the said Jones Panton, deceased, to take the Devonshire-street houses as his share of the property, and for Mr. Hurlock to take the Cursitor-street houses as his share thereof"—which is suggested in the interrogatory ; that there was to be a voluntary division of the property. Then he states : " The fact is, that there were so many communications passed, and so many propositions made, in respect to the partition of the property, that it is impossible for me to recollect what the propositions were which were made and rejected. There was a negotiation for a partition of the property, entered into at the beginning of the year 1834, or at the end of the preceding year, I forget the exact period, and such negotiation had reference to a proposed division of the property, either by drawing lots, or by arbitration. The mode of partition ultimately agreed to combined both the modes interrogate ; the agreement being, that the property should be divided by arbitration, and the two divisions taken by the parties drawing lots for the same. An agreement to arbitrate was prepared accordingly, by Messrs. Forbes and Hale. I believe, that the agreement was executed by the deceased and Mr.

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Hurlock. I was not, to my recollection, present when it was executed by either party, but we acted upon it, and it was in our hands as executed. To the best of my recollection, the agreement bore date the 31st of May, 1834, but I cannot speak positively to the date. I do not recollect who attested the execution of the agreement by the deceased. An award, in the nature of an allotment to each party, was made under the agreement, on the 2nd of August, 1834. I do believe that the papers and documents of the producent, which were seized when he was apprehended upon the charge of forgery, in February, 1838, were kept by Ruthven. After the trial, the originals were returned. I have, since my former examination, referred to the papers in our office, to enable me to answer more positively to some of the questions put to me. I have now ascertained therefrom, that Mr. Hurlock did, as suggested in or about September, 1832, object to grant leases of the houses in Devonshire-street, until the property should be severed. I can now also answer, that it was, as suggested, in April, 1833, that Mr. Curtis was instructed to make the estimate of the value of the property, with the view to the partition. I have also ascertained, that in July, 1833, Messrs. Forbes and Hale did receive a letter from the producent, proposing on behalf of the deceased, that the deceased should take the Devonshire-street houses, with the addition, however, of those in Cavendish-court also, as his share of the property. The letter does not go on to specify that Mr. Hurlock should take the Cursitor-street houses as his share, but that was intended, I presume, by the proposal. I believe that a copy of such letter

was sent by Messrs. Forbes and Hale to Mr. Hurlock. The proposition the producent just referred to was not acted upon; I do not know that it was rejected by or on behalf of Mr. Hurlock. There was a good deal of correspondence passed on the subject of it, and eventually it was not acted upon. I still am unable to answer positively as to the date of the agreement to arbitrate, or as to the names of the witnesses to its execution by the deceased; but I have found a memorandum in my own handwriting, in which it is stated that the names of the three witnesses were 'T. Williams.' (the producent, I presume), 'E. Evans,' and 'Ann Williams.'"

I have read the deposition on this part of the case, because it is suggested, in one of the additional articles, that one of the papers, indeed two of the papers, do contain plans of houses, which were possessed by the deceased and Mr. Hurlock in Cursitor-street, Castle-Street, Bishopsgate-street, and Cavendish-court, and, upon the face of these papers, as they now appear, the witnesses do depose they trace the word "map" on one of these papers, and the designation of the houses, the numbers of the houses; and upon another, the word "ground," which is stated to be a piece of vacant ground, the site on which two houses formerly stood in Cursitor-street and Castle-street, and also another space in Cavendish-court and Devonshire-street or Devonshire-place, and, therefore, whoever impressed these marks on the papers must have been pretty well acquainted with the site and nature of the premises described upon it; for, unless it were so, it would scarcely be possible for any person to have so marked the site of

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the premises and description of the property upon these papers ; and Mr. Boys, when he had refreshed his memory by a reference to the papers, does depose, that a plan was suggested for a voluntary partition of the estate, by Mr. Panton taking possession of the houses in Devonshire-street and Cavendish-court, the other to be the portion of Mr. Hurlock.

The next subject of inquiry is, how and when were these marks discovered on these papers, and by whom ? It may be right, in the first instance, to state the manner in which these papers came out of the possession of Mr. Williams himself, so far as those persons through whose hands they passed are enabled to state it. I have already stated that these papers were deposited at Messrs. Childs' banking-house, in January, 1837 ; that they were removed from the banking-house on the 13th or the 30th of June, 1837 :—I say either the 13th or the 30th, because Mr. Boys, who deposes to the dates, states, in his examination in chief, the 13th, and to an interrogatory, the 30th. It is very possible it may have been a mistake of the examiner in taking down the depositions. They were delivered from Messrs. Childs' banking-house into the possession of the proctor for Mr. Williams. They first came to Mr. Williams through Ellen Evans, who had deposited them there, and who removed them thence ; from the proctor's hand they seemed to have passed into the hands of another proctor of the Court, merely for the purpose of being brought in annexed to an affidavit of scripts ; they were then brought in by that proctor to the Court ; then taken into the care and custody of the registrar—that care and custody is necessarily confided to clerks in

the office, persons who, from the experience which the registrars have had of them, must necessarily be supposed to be persons of trust, in whom perfect confidence may be placed, and from all the Court has ever seen of the custody of papers in the office, and the experience of a great number of years, the greatest care is taken of papers of this description;—from the registrar they are delivered into the hands of the examiner, who takes the deposition of the witnesses on the *condidit*. Upon the conclusion of these depositions they were again returned to the custody of the registrar.

Now the proctor for Mr. Williams has been examined as to the state and condition of the papers when he received them, and he swears that he never observed any marks on the papers during the time they were in his possession. The gentleman to whom they were delivered, for the mere purpose of being brought into the Court, has also been examined, and though his recollection is only called to the circumstance by the assignation book—shewing that he did bring in an affidavit of scripts—he observed no marks, nor was it likely he should. The examiner, into whose hands they were delivered for the purpose of taking the evidence on the *condidit*, has also been examined, and he observed no marks of the description of those now stated to be on the papers. He says, that, when he examines them now, he thinks he sees certain marks and blurs on them, which, if they had been there when they were in his possession, would have attracted some attention. The Registrar has been examined, and he deposes not to have seen any marks on the papers, though when an interrogatory is put, he

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says, "It is possible that some marks like those pointed out might possibly have appeared on the papers without my attention having been called to it, as suggesting anything unusual in the appearance of the papers." The clerks, who have the custody of the papers, have been examined—one, whose examination was completed, positively swears he did not observe any marks on the papers—the other clerk unfortunately died while undergoing his examination, but I think it is clear that, if his examination had been completed, he must have deposed to the same effect; and all the witnesses concur in stating, that these papers, when passing through their respective hands, were precisely in the same condition as when they received them. They, therefore, are not the persons by whom these marks were made on these papers, and the Court has no suspicion that any of these gentlemen could have been concerned in such a transaction. The papers then passed into the hands of the examiner (Mr. Jennings) who took the depositions of the witnesses under the commission at Carnarvon, and that examiner, who has been produced as a witness, is the person by whom the discovery of these marks is said to have been, in the first instance, made. The account which he gives, is, that he attended at Carnarvon as an examiner, and arrived there on 5th of January, 1838. An error was discovered in the commission, and it was returned to London, and a fresh one was obtained, which was opened in the parish church at Llanbeblig, in the county of Carnarvon, on the 10th of January—though I believe it turns out to be the 11th of January, he says: "The commission I am now

speaking of was extracted on behalf Mr. William Barton Panton. There was another commission extracted on behalf of Mr. Thomas Williams. There was an error in that commission also, and it was returned to London, and a fresh one obtained, which was opened in the parish church of Llanbeblig, which is about a mile distant from Carnarvon, on the same day that the first mentioned commission was opened. On or about the 16th day of the same month, the execution of the commission extracted on behalf of Mr. Williams was completed, sealed up, and delivered to his proctor to return into Court, and his proctor left Carnarvon therewith. I was employed only on the evening of the 15th, and until noon on the 16th, as nearly as I can recollect, in executing the commission extracted on behalf of Mr. Williams. Immediately between the morning of the 10th and the evening of the 15th of January, I had been employed in executing the commission extracted on behalf of Mr. Panton. Having finished Mr. Williams' commission, and delivered the same to his proctor, I resumed the execution of Mr. William Barton Panton's commission, and continued employed therein until nearly midnight, when the term probatory expired. On the following morning, the 17th of January, 1838, I received notice of that date, from Mr. Williams himself, who was conducting his own examination, in the absence of his proctor, and I discontinued the execution of the commission until the 22nd of January, when I resumed the execution of the commission, and was occupied therewith until the 2nd day of February. About the 14th or 15th of January, on the occasion of Mr. Wadeson, Mr. Williams' proctor, bringing

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his witnesses, or one of them to inspect the scripts, Nos. 1, 2, 3, 4, 5, 6, 8, 10, and 11, or some of them, prior to producing such witnesses or witness, I observed something remarkable in the signatures of the attesting witnesses to the scripts, Nos. 1, 2, and 6." That was, I suppose, the different manner of signing the name. In one place, E. Evans is spelt apparently without the "s." No. 2 is now described as a duplicate to the will, and it was upon that paper that the marks were also first discovered by the substitute for the proctor, on behalf of Mr. W. B. Panton, "I did not attribute any particular importance to the circumstance. I was aware that there were the remains of pencil-writing on the script, No. 2, on the 17th of January; I have no doubt of that fact. I did not inspect the scripts, or in any way refer to them, between the 17th and 22nd of January exclusively; but, after my return to Carnarvon, on the latter day, I inspected them all narrowly, from time to time, as opportunities occurred for my so doing. I subsequently discovered the remains of pencil-writing upon all the scripts. On or after the 22nd of January, William Kenney Tyrer, the substitute of Mr. French, the proctor of William Barton Panton, asked me if he was not entitled to inspect the said papers, which he stated he had never before seen. I informed him that he had a right so to do, and advised him to inspect the same carefully. He did, accordingly, thereupon, inspect the papers in my presence, and thereupon observed pencil-writing upon some of them. Having carefully inspected the several scripts in the course of my present examination, I have no hesitation in deposing that

the same are now in the same plight and condition as they were in when first entrusted to my charge, save that they seem to have been much handled since, whereby part of the pencil-writing or marks have been effaced." So that Mr. Jennings had discovered something remarkable in the signature of one of the witnesses, on the 15th of January, and upon the 17th (before the 17th) he observed some pencil-marks on No. 2; afterwards, upon his return to Carnarvon, after the extension of the term probatory, he took the opportunity of examining the papers more particularly, and then discovered pencil-marks on all the writings. That is the history of the discovery of these marks, and this circumstance occurs: Mr. Wadeson, the proctor for Mr. Williams, and several other witnesses, had been called in to inspect these papers. Mr. Jennings states, that, on the occasion of Mr. Wadeson bringing his witnesses, or one of them, to inspect the scripts, or some of them, prior to producing such witnesses or witness, he observed something he had not before observed upon these papers, I refer to this to found the observation, that these pencil-marks did not obtrude themselves on Mr. Wadeson's notice at this time, and they were not likely to have been more prominent, more clearly traceable, on the face of the papers then, than they were when he finally parted with them.

Mr. Jennings has also been examined on interrogatories, and the great point to be ascertained is, the custody of these papers whilst they were in his possession. He says, "I did arrive at Carnarvon with, and for the purpose of executing, the com-

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missions for the examination of the witnesses in this cause, on Friday, the 5th of January. The commission on the producent's allegation was opened on that day in Llanbeblig church, and George Bettiss was produced and sworn as a witness under the same. My fellow witness, W. K. Tyrer, did act as the substitute of the producent's proctor. The commission was adjourned to the Goat Inn at Carnarvon. The examination of George Bettiss was afterwards commenced. An error was discovered in the commission by me. I communicated the same to other persons, and the proceedings under the same commission were consequently discontinued. I did leave Carnarvon, after discovering the error, and I did return thereto on Wednesday the 10th day of January. I had been to the following places, and I disposed of myself in the following manner, in that interval. Having communicated, on the morning of the 6th of January, the error which I had discovered in the commission on the previous evening, I remained in Carnarvon that day, until about six o'clock in the evening, when I left Carnarvon by the mail and went to Bangor;" stating the places he was at till his return to Carnarvon on the morning of the 10th of January, that being the day on which fresh commissions were receivable at Carnarvon. He says, "I so disposed of myself, rather than stay at Carnarvon, because I understood from Mr. Wadeson, the ministrant's proctor, that a strong feeling of jealousy existed between the parties in this cause, who were very hostile to each other; and, Carnarvon being a small place, I should probably have come in contact with the parties, or their friends, had I re-

mained there, which I considered it was desirable for me, as the examiner in the cause, to avoid doing. The new or second commission, for the examination of witnesses on the producent's allegation, was opened on the 10th of January, in Llanbeblig church, and two witnesses, namely, George Bettiss and Robert Spencer, having been then produced under the same, the commission was then adjourned to the Goat Inn, and there executed. The rooms which I occupied as my examining and sleeping rooms at the inn, on the 5th and 6th of January, whilst engaged under the first commission, were two adjoining front rooms on the first floor of the inn, both with windows looking on to the square at Carnarvon—the examining room being on the right hand side when you gain the landing place on the first floor. They were the same rooms as those occupied by me on my return to Carnarvon, on the 10th of January. I dined in my examining-room on the 5th and 6th days of January. I am not quite sure whether Mr. Tyrer then dined with me, but before dinner on that day, I well remember informing Mr. Tyrer that it was usual for the commissioner to be asked to dine with us, and that it was his place to invite him, which was done, but he declined the invitation; and also that I wrote a note to Mr. Wadeson on the subject of the dinner, and he declined. The same room was used by me for an examining-room from the 10th of January, and from the period of my first arrival at Carnarvon, and so long as the ministrant's proctor remained thereat. During the time that I was absent from the Goat Inn,

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previous to my departure, and during the time occupied in the opening of the two commissions, and of the commission afterwards opened for the examination of witnesses on the allegation of the ministrant, I had not the testamentary papers about my person ; but, during such time, the papers were locked up in my portfolio, which was secured by one of Bramah's patent locks, the key of which I had in my pocket, and the portfolio itself was also locked up while the commissions were being opened, either in my examining-room, or my bed-room, at the inn, and while I was absent from the Goat Inn, previous to my departure from Carnarvon, in a cupboard in my bed-room, and I had the key of the bed-room, or the cupboard, in my pocket at such times, as well as the key of the portfolio." So that, at the time Mr. Jennings was at Carnarvon, between his arrival there, and the discovery of the error in the commission, and his departure from Carnarvon, it is quite impossible that more care should be taken of the papers, and more caution used, than by him ; but I do not perceive, from any part of this evidence, that Mr. Jennings deposes, that, whilst he was absent from Carnarvon, the papers were with him. He does depose; that, when he was absent afterwards, from the 17th of January to the 22nd, the papers were with him during the whole of that time ; that he brought them to London, and they returned with him to Carnarvon. But there is this circumstance, though not expressly stated by Mr. Jennings ; that, it was after his return to Carnarvon that these papers were again inspected by Mr. Wadeson, and the marks upon them did not

attract his observation. Therefore, it was not probable, that, during this interval, these marks should have been made on these papers.

Mr. Jennings proceeds to state, "I did on the Sunday attend evening service at a Wesleyan chapel in Carnarvon"—that is the 14th of January, when he had attended the church at Llanrug, for the purpose of inspecting an entry in the register book ;—"in consequence of that being the only place where the service was conducted in English, the service in the Established Church being performed in Welsh. I did mention to the proctor to the ministrant that I had done so. I had not the testamentary papers annexed to the affidavit of scripts of the ministrant's in my actual personal charge, either when I so went to Llanrug, or whilst I was so attending service at the said chapel, but the papers were locked up during such time in a cupboard in my bed-room, in the inn, in which the portfolio in which they were locked was deposited, and I had the key of the cupboard, and also of the portfolio, in my pocket, and therefore in my own personal charge during such time."

In answer to the interrogatory, whether he did not swear upon the trial at the Old Bailey, with respect to particular facts, he says:—"I was examined as a witness on the prosecution of the ministrant, on the charge of forging the testamentary papers in question. I did not, in answer to a question put to me by Mr. Jervis, say 'I was there, meaning at Carnarvon, three weeks; I believe I happened to be there three weeks from the time I opened the commission, and I am not aware that I left it, meaning the said Goat Inn, three minutes

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without the papers, that is to say, I might have gone out for a walk for a few minutes, but certainly not for any length of time ; I am sure that I never was out for half an hour at any one time ;' the church at Llanrug being about three miles, the chapel being about a quarter of a mile, and the church at Llanbeblig, where the commissions were opened, being more than a mile distant from the inn. I did not also, in reply to a question put to me by Mr. Jervis, ' why I did not lock them (meaning the testamentary papers) up in the cupboard ?' answer as follows ; — ' Why, Sir, the room I was in, I was going back to immediately. I was not at any time one hundred yards from the house all the time I was there.' I have referred to the short-hand writer's report of the trial, and I find that those words are therein attributed to me ; but they are incorrectly attributed to me, and I most positively and unqualifiedly deny that the above-mentioned answers were ever given by me. The report is not in those respects in accordance with what I actually said. I do not pretend, at this distance of time, to state correctly what I did actually say in lieu of the above-mentioned words attributed to me ; I may have said, ' I am not aware that I left it (meaning my room in the inn) three minutes without locking up the papers, &c. ;' and if I said ' I was not at any time one hundred yards from the house all the time I was there,' I must have meant, under the circumstances stated or implied in the questions which had been put to me. Again I deny that I ever spoke the words attributed to me in this interrogatory, in the sense which they imply as therein quoted." And it is hardly possible he should have given such an answer

to the effect of stating what is there suggested, because to have said that he had gone to a church two miles distant, to another place of worship a quarter of a mile, and never was absent from the house one hundred yards, would be to impute to him the grossest absurdity.

He says: "The proctor of the ministrant did leave Carnarvon on Tuesday, the 16th day of January, for I did not see him there after that day. I changed my examining-room after my return, on the 22nd of January, to Carnarvon, after having been in London. I did, myself, leave Carnarvon, and proceed to London, on Thursday, the 18th day of the month; it was not till after my return thereto that I changed my room. I had the testamentary papers in question with me when I was in London, and during my absence from Carnarvon, to wit, from the 18th to the 22nd of the month." So that these papers could not have been tampered with during this time, by any person remaining at Carnarvon. "It was previous to my leaving Carnarvon, on the 18th day of January, that I first observed marks on some, or one, I cannot say which, of the testamentary papers; but I did not give any attention to such marks, in the way of making them out, until after my return to Carnarvon. William Kenney Tyrer did usually dine with me during the execution of the said commissions. We dined sometimes in another room, on the same floor with my examining-room and bed-room, and sometimes in a room on the ground floor." And it appears that Mr. Tyrer did dine with him generally, during the execution of the commission. Mr. Wadeson had declined to dine with Mr. Jennings and the

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substitute, he being at that time upon a visit to his client Mr. Williams; and the Commissioner also declined; and Mr. Jennings and Mr. Tyrer were dining together generally, during the progress of the commission, by themselves, at the Goat Inn, at Carnarvon. I must again express my wish, as I did during the argument, that Mr. Jennings had used the same caution, which induced him to leave Carnarvon between the 5th and the 11th of January, as he knew the parties were hostilely inclined towards each other; yet, after his return from London, with the papers in his possession, and after he had made the discovery of the marks on these papers, he does abandon and depart from that caution which he had so properly used in the first instance, and suffer Mr. Tyrer to be alone with him on many occasions, during dinner, during the execution of the commission. I wish Mr. Jennings had said, "though it is usual for the practitioners and the examiner to dine together during the progress of a commission, yet, upon this occasion, you know, as well as I do, the hostile feeling subsisting between the parties, and it would be much better that we should have as little intercourse as possible, except in the presence of the other parties."

He goes on to state; "I did not communicate during such time with the proctor of the ministrant, or ever signify to him or let him know of my presence in London. I went to Mr. French, the producent's proctor, to ascertain that the term probatory in this cause was extended, and to urge him to attend at Carnarvon; but I had no occasion to see the ministrant's proctor during such time." The ministrant's commission had been closed, the

witnesses examined, the examination of the witnesses returned to London, therefore there was no communication afterwards which Mr. Jennings had to make; but, as the other commission was to proceed, and the term probatory was extended, it was natural enough that Mr. Jennings should see the other proctor, and state the inconvenience that would ensue from no practitioner being there.

From the general tenor and effect of this evidence of Mr. Jennings, it should seem that he had, after these papers had been entrusted to his care as an examiner of the Court, carefully placed them so as to prevent access by other persons without his knowledge and consent. I think it is impossible that any person could have had access to the papers for any purpose—certainly not to make those marks which are stated to be now visible.

Another witness, who has been examined with respect to these alleged discoveries, is Mr. William Kenny Tyrer, the substitute for the proctor for Mr. W. B. Panton; and he also has been examined upon the additional Articles. He says: “On the 24th or 25th of January, it was possibly on the 26th, I asked Mr. Jennings, who was still employed in examining our witnesses, if I might look at ‘the wills,’ or ‘Williams’ documents.’ I wanted to look at the signatures of the attesting witnesses to the deceased’s will, it being part of our case that two of such witnesses could not write. Mr. Jennings’ answer to me was, ‘Certainly; you have a right to look at them, and I should advise you to look at them very carefully.’ Accordingly, I did thereupon proceed to inspect the scripts, in Mr. Jennings’ presence, and I then, for the first time,

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observed pencil-writing upon some of them. It was on the script No. 2, that I first saw the pencil-writing, and I shall never forget my feelings on so doing. On the 7th of February, Mr. W. B. Panton being at the house of Mr. Henry Rumsey Williams, on other business (relative to his being appointed High Sheriff of the county of Anglesey), the latter referred him to me, telling him that I had some news to tell him about this cause ; and I then told him of my having discovered pencil-marks on the scripts." That is a subsequent communication made on the 7th of February to Mr. W. B. Panton ; but it appears by the evidence of the witness on interrogatories, that, having made the discovery, which he says produced feelings such as he shall never forget, he communicated it to Mr. Rumsey Williams, who was at that time under (or had just completed) his examination as a witness in the cause. On the interrogatories, he states the circumstances rather more in detail, but still to the same effect.

I am not aware that the case is carried any further by this witness, as to the alleged discovery, than it is in his deposition in chief, namely, as to the manner in which Mr. Jennings was employed in taking the depositions, and in which he was employed as the substitute for Mr. French, and the circumstances which afterwards took place with respect to the fac-similes made of these papers. This witness stated he had not before inspected the papers ; but, I think, he says, in one of the interrogatories, he had looked cursorily at one of the papers, but not for the discovery of anything particular on the face of it ; but he did look, when

his attention was called to them particularly by Mr. Jennings, and he then made the discovery which he alleges to have produced feelings which he cannot forget. It was observed, with respect to this witness, that it was somewhat extraordinary that, as part of his case was that two of the attesting witnesses could not write, he had not called on the witnesses to inspect their alleged signatures. I confess that objection does not strike me forcibly, because, as the plea was on behalf of the parties whose substitute he was, that the witnesses could not write, and as the witnesses were to be produced to prove that fact, what was the use of shewing them the handwriting? It was not a case of doubtful handwriting; where it is pleaded that witnesses could not write, it does not occur to me that there was any imperative need of calling the attention of the witnesses to the particular signature of the attesting witnesses, the allegation being that they could not write at all.

This witness goes on to state : . " I usually dined with Richard William Jennings, the examiner, during the execution of the commission ; Mr. Henry Rumsey Williams dined with us twice." Again, I think that was not quite a correct mode of proceeding, considering all the peculiar circumstances which at this time surrounded the case, and after the discovery had been made ; Mr. Rumsey Williams, more especially, being a witness to be examined, or under examination, about the time this discovery took place.

Now, upon the discovery being made, upon the 17th, and afterwards more exactly followed up, Mr. Jennings proceeds to make fac-simile copies

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of the papers. He applies to Mr. Tyrer to procure tracing-paper, which is procured somewhere about the 25th or 29th of January, and the fac-simile copies are made by the examiner, and afterwards collated by Mr. Tyrer. I think here, again, that Mr. Jennings should have abstained from communication with Mr. Tyrer, the substitute of one proctor, in the absence of the other proctor; I think it would have been better if other persons had been applied to, or Mr. Jennings had done it himself; the commissioner would have been much a more proper person, and more impartial between the two parties. But I do not think that anything very material arises out of this, for as Mr. Tyrer had discovered these marks, his proceeding to examine the copies of Mr. Jennings, proves nothing against the authenticity of the copies so made; but it creates strong jealousy in the minds of these persons who were concerned in a litigation carried on in such a hostile manner.

When this discovery is made, and these fac-simile copies are taken, the commissions were closed, and were returned to the Court, and some communication was made to some individuals with respect to the discovery; and amongst others, a communication was made to the Court—not in the channel it ought to have come through, in the first instance, but from a person to whom it was communicated by the examiner. But it struck the Court as a most improper channel to receive that communication by, and, therefore, directed that person to tell Mr. Jennings his duty was to communicate through the registrars. Accordingly, some communication was made to the Court through

the registrars, and the Court was applied to, to know whether it would sanction any steps that might be taken by Mr. Jennings. The Court declined giving any such instructions, for at that time communications had been made in another quarter, to what extent the Court was not informed—Mr. Tyrer and Mr. Rumsey Williams had been informed of what had passed, and the Court was called upon to say whether it would sanction ulterior proceedings by the examiner, which examiner had already communicated the facts to other parties. It was not for the Court to direct what future proceedings should be taken, and it was, therefore, left to the examiner to pursue his own course.

The course the examiner pursued was this:—he communicated with other persons out of the profession; having, as he believed, discovered traces of a gross fraud attempted to be practised, he took the steps he thought his duty dictated, for the purpose of bringing the parties guilty of the fraud to justice. Accordingly, upon his representation, a warrant was issued for the apprehension of Mr. Williams and the two attesting witnesses to the will, and they were brought to London; the papers of Mr. Williams were seized, including the correspondence with his proctor in this cause; and the parties were committed to take their trial at the Old Bailey. There Mr. Jennings was examined as a witness, and the result was, the acquittal of all the parties.

But there is another circumstance in the proceedings to which the Court must advert, that is, although Mr. Jennings does not himself interrogate

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these witnesses, as to what had passed at the execution of the will, he is present when Mr. Tyrer puts questions to them with respect to the manner in which the will had been executed; although it is the duty of the examiner, in all these cases, to caution witnesses against the disclosure of any part of their evidence till publication shall have passed in the cause. I cannot think that Mr. Jennings did right in suffering questions to be addressed to the witnesses by another witness, which might have led to a premature disclosure of the evidence. I cannot, also, but remark, that I think the character Mr. Jennings assumed, that of an Irish gentleman, and entering into conversation with the witnesses on the subject, is not precisely that line of conduct which should have been pursued, notwithstanding he might consider it his duty to do all he could to bring these parties to justice.

But the great point is, if possible, to discover when the marks were impressed on the papers. Now, I must say, it seems utterly impossible, almost incredible, that these marks should have been impressed upon them after they came into the registry of the Court; for I have traced them through the hands of all the parties they must have passed through. It seems to me also that they must have been impressed on the papers by some person who knew the nature and situation of the property the subject of partition, and that it would occupy a considerable time for any person to make these plans on the papers, well acquainted as he might be with that property; and I find the greatest difficulty to come to any conclusion on the point, because I do find it stated positively, in the evidence of Ellen

Evans and Ann Williams, that, at the time they saw the papers executed by the deceased, there was ink-writing on them, and not pencil-marks. And even if there had been these pencil-marks at that time, if there was ink-writing, which forms the will of the deceased, he was in possession of the contents of the writing; for he had it in his hand, and was apparently reading it, when the witnesses went into the room; and he executed it with the knowledge that this writing was on the papers. The Court must entirely disbelieve the subscribing witnesses before it could come to the conclusion that this was a fraud practised by Mr. Williams, by getting the deceased to execute the papers as plans for the proposed partition; though there is a veil of obscurity through which the Court cannot penetrate; a mystery, which it cannot disperse. My difficulty increases every time I look at the proceedings, because, on the one hand, I find a disposition contrary to every probability, namely, the exclusion of Mr. W. B. Panton and the substitution of Mr. T. Williams in his place; and there is a circumstance which I have purposely reserved to this moment, namely, the occurrence on the 4th and 12th of May. Mr. Bettiss deposes that, upon the 4th of May, he and Mr. W. B. Panton, having been engaged to go together to Chester races, were requested by the deceased, though they had taken their places by the mail, to continue at home, as he had something important to say. On the 4th of May, Mr. Bettiss expressly deposes the deceased did make a donation, as it is called, of the whole of the property he possessed—pictures, books, and wine; the key of the cellar and the

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library, and the places where the property was kept were delivered out of his hands to Mr. W. B. Panton, and stock receipts to the amount of 19,000*l.*, on part of which no dividends had been received for years, he was put in possession of by the deceased. But it is said that Mr. Bettiss is a witness who cannot be believed; that he is the adviser of all the proceedings on behalf Mr. W. B. Panton; that he has sworn that the first intimation he had of the existence of the will was on the 26th of July, whereas it was brought into Court at an earlier period; and, therefore, he is not to be believed where he is not confirmed by other credible witnesses. I have already stated what I believe to be a fair explanation of Mr. Bettiss' evidence on that point; but, in point of fact, Mr. Bettiss is not unsupported by other witnesses, because, upon that very day, the deceased directs him to apply to Mr. Rumsey Williams for a parcel in his possession; and accordingly Mr. Bettiss does see Mr. Rumsey Williams on the subject, and asks him for a parcel, and Mr. Rumsey Williams states he does not know what the testator means. The result is, a letter is written, and it is produced and spoken to by Mr. Rumsey Williams and Mr. Bettiss. Mr. Bettiss, writing to Mr. Rumsey Williams on business, states that it was the will he meant. Mr. R. Williams writes to him that he is going to Plasgwyn, and will bring it with him. That takes place on the 8th of May—one day after the execution of the codicil to confirm the will of 1834. On that occasion, the will is taken over, and delivered to the deceased, cursorily read by him, according to Mr. Rumsey Williams, and he declares his intention to alter his

will at some future time, and make some provision for the young daughter of Mr. W. B. Panton, to whom it is proved by all the witnesses he was very much attached; and afterwards, when he has so cursorily read the will, he delivers it to Mr. W. B. Panton as his last will, and desires him to take care of it. Now why is the Court to consider all this as a mere fabrication on the part of Mr. Rumsey Williams and Mr. Bettiss? The former part, if it stood by itself, is somewhat extraordinary, that the deceased represented not to have been a man of business, and to have been deceived in the settlement upon his eldest son, though afterwards his caution is aroused and awakened—that he should have made this donation in the formal manner here represented, followed up by the delivery of the key of his plate, his library, and so forth, and that he repeated this upon the 8th of May. But with respect to the other transaction deposed to by Mr. Rumsey Williams, I know of no reason why he should not be believed on his oath, but that he is the father-in-law of Mr. W. B. Panton, and has been consulted in the course of the proceedings. But he is confirmed by Mr. Jones of Glanbenno, who was there at the time, having gone on business to Mr. W. B. Panton, though it is said he came in, in the nick of time, to dovetail the evidence! Then there is a further conversation with respect to the regard and affection the deceased had for Mr. W. B. Panton, in the presence of Mr. Spencer. They are stated to be all the personal friends of Mr. W. B. Panton; but they are persons upon whose general character there is no imputation whatever, and it is only because they depose adversely to the

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case set up by Mr. Williams, that the Court is to conclude that this is a mere fabrication. I am not prepared to go to such a length; therefore do believe that these transactions took place on the 8th and 12th of May, after the date of this codicil confirming the disposition of 1834, and also a few days before the deceased was taken ill of the illness which terminated in his death.

All these circumstances have created the greatest difficulty in the mind of the Court, which is left in the greatest uncertainty; there is a mystery which it cannot penetrate. In examining the depositions over and over again, I cannot bring my mind to any conclusion, as to the persons by whom, or the time when, these marks were made upon the papers; I am left in a state of the greatest doubt.

Observations have been made on the appearance of the papers, and it is extraordinary. They are not in the form (papers 1 and 2) usually adopted by solicitors in drawing wills, if they use brief paper; or if on a common sheet of paper; it is usually written upon from the top to the bottom; whereas these papers open like maps, with the fold between the pages perpendicularly, and not horizontally; and there are certain indications upon the papers, from whence the Court might be led to conjecture, that there had been a crowding in of certain words, to bring the contents down to that part of the paper to which the signature of the deceased is affixed; and with respect to the disposition in the first paper, there is no recital of the settlement of the real estates alluded to, and the length of the will executed in 1828, in which that settlement is recited, is a circumstance which tends, in some

degree, to lead to a conjecture that it is possible they might have been used for other purposes than those for which they now serve. But the Court cannot act upon such conjectures against the testimony of the two subscribing witnesses. And there was great force in the remark of the learned counsel for the executor (Dr. Addams) that the most improbable thing which could have occurred, would be Mr. Williams' placing himself at the mercy of Ann Williams, who left his service in 1835, and was living as she could, at different hotels and public houses; it does seem one of the improbabilities with which this case abounds from beginning to end.

The instructions for the will are very strange; undoubtedly they are in the handwriting of the deceased, but they are such as the Court can hardly decipher, and it is difficult to suppose they could be intended for the disposition of such a property as this; and the other papers, the ~~script~~ No. 6, exhibited as containing the attestation of the witnesses to the will of the 31st of May, 1834, which is to form the foundation of these proceedings; all tend to the conjecture that these papers might have been used for the purposes represented. It might have been the case of Mr. Williams, that, in fact, he had used paper, which he employed for drawing plans, for the preparation of the will; but the Court cannot have recourse to such solution of the difficulty, because Mr. Williams has expressly stated that there were no such marks upon the paper; that he never used them for any other purpose, and that they have been tampered with since they came into the registry of the Court. The Court is thus driven from a possible solution of that kind, though it

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might be an improbable story, that these papers should be so casually taken up, at the house of Mr. Williams, a solicitor. I say the papers themselves are suspicious, and some circumstances about them do seem to me very extraordinary. The paper No. 5 purports to be the draft will of November, 1834, and had been converted from the draft of the will of May, 1834. The paper No. 11 is the draft of the codicil of the 15th of October, 1836. Now it is proved that both these papers are made by the same manufacturer, and in the same year. No 11 appears to be the right hand leaf of a sheet of paper similar to that upon which the draft will of 1834 was drawn, and the mode of division of the property proposed to be made, according to Mr. Boys' evidence, is to be traced from the one to the other of these two papers. That is a most remarkable circumstance; it seems to have been done by some person employed to draw out a plan for the approbation of the person who is to agree to this partition, and who, at the bottom of these papers, writes,—"I approve of this," as if it was something different from the instructions for a will; as if approving of something proposed to be done, not a testamentary act. Mr. Boys says it was in agitation that Mr. Hurlock should take part of the property, and the name "Hurlock" appears on one side of the paper, and "Panton" on the other—"Cursitor-street" and "Castle-street" are placed under the name of Mr. Panton, and other parts of the property under the name of Mr. Hurlock—and this does create considerable suspicion that all is not right; and, without going further into an examination of the papers, it does appear to me to be one of

those cases in which there is a mystery, which the Court cannot penetrate. It is true, when a party sets up papers of this description, he is bound to prove that the testator executed them with a full knowledge of their contents, and with an intention to give effect and operation to them as his last will and testament; and if the witnesses on the condidit had varied in any material degree, the Court would have had great difficulty in coming to the conclusion that this was the genuine act of the testator. But when I see these witnesses consistent from the beginning to the end, not varying in one single particular as to the facts from the first moment when they were examined in the cause on the condidit, though they were examined extra-judicially by Mr. Tyrer, afterwards judicially at the Old Bailey, and afterwards twice in this Court;—when I find them consistent throughout, and adhering to the story originally told, I cannot feel myself at liberty to say that I entirely disbelieve the witnesses; and if I cannot disbelieve them, why then it is proved that the deceased did execute this as his last will and testament, with the full opportunity of knowing the contents of the papers; and being so, the Court can pronounce no other sentence than in favour of their validity. And, accordingly, *the Court does pronounce for them, though not without great doubts, great difficulty, great misgiving, in its own mind, with respect to the real state of facts.*

I, therefore, pronounce for the validity of the papers, and, amongst them that of the 7th of May, because, if the other part of the story is true, with respect to the execution of the will and the first codicil, the codicil of the 7th of May does not par-

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take of the improbability which exists in respect to the will, if it stood alone. The transaction of the 7th of May is a very doubtful and a very questionable one; but if the Court feels bound, as it does, to pronounce for the will and the first codicil, it cannot pronounce against the codicil of the 7th of May; therefore I pronounce for all these papers.

Utterson & J. v. Williams. July 1: 1843.

In the goods of JAMES DAVIES.

1840.

August 4th.

The Court will grant administration to a son, in preference to a widow who had been divorced for adultery committed by her.

Motion.

The deceased died 24th of July, 1840, intestate. In 1835, he had been divorced *a mensâ et thoro* from his wife, by a decree of the Consistorial Court of London, on the ground of her adultery. She afterwards went to America, and married in that country, where she still remained.

Burnaby moved for administration to the son of the deceased, in preference to the widow. He cited *Williams* on *Executors*, (p. 321,) and the cases there mentioned.

SIR HERBERT JENNER.

Although this Court has a discretion granted by the statute, the practice, which is the law of the Court, is to consider the widow as entitled to the administration in the first instance, and although divorced *a mensâ et thoro*, she is the widow still. But where she has been divorced from her husband

for adultery on her part, I think the case is a proper one for the Court to exercise its discretion.

Administration decreed as prayed.

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August 4th.

In the goods of
DAVIES.

BELCHER *against* MABERLY.

Motion.

1840.

Nov. 6th.

The deceased, Mr. John Maberly, died 4th of October, 1839, intestate, leaving a widow and children, two of them minors. In 1832, he had become bankrupt, and Mr. Alexander Belcher had been appointed his official assignee. Two of the sons resided abroad, one in the East Indies. A decree with intimation issued at the instance of the official assignee, which was served in the usual way. The property was under 50/.

Where an administration is granted, without a *personal* service of a citation on the parties having the prior title, the Court requires the sureties to justify. In the case of a bankrupt deceased, the Court declined to dispense with such rule in favour of the official assignee.

Deane prayed the administration to Mr. Belcher, and that the Court would dispense with his giving justifying security.

SIR HERBERT JENNER.

The Court cannot hold that the official assignee is in a different situation from other persons where there has not been a personal service on all the parties. The administration is prayed without justifying security: I can see no reason why it should be so. The property is at present small, but if it should be larger, the grant of administration will remain. The usual course is, where there has not been personal service upon all the parties,

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that there shall be justifying security ; and in this case the Court is not inclined to depart from the rule. The official assignee must take the grant, subject to the usual conditions attached to it.

GODRICH *against* JONES.

1840.

Nov. 6th.

A witness having admitted that he was answerable to the proctor in the cause for his costs, the Court held that the witness was incompetent, but allowed the conclusion of the cause to be rescinded for the purpose of the witness being released, and re-produced and re-examined as a witness. At the same time stating that in future the Court would not make such an order.

This was a business of proving the will, with two codicils of Harriet Lloyd, deceased. (a)

The cause now stood for hearing, when The *Queen's Advocate* and *Haggard*, for Mr. Jones, objected to the testimony of Mr. Kirkman Lane, the drawer of the will in question, on the ground that he had an interest in the event of the suit. In answer to an interrogatory, he deposed : "It is the fact that I employed Messrs. Smale and Son, the proctors, to conduct the suit on behalf of the producent (Mr. Godrich) ; there was no arrangement between us as to the payment of their costs ; but I certainly am answerable to them for their costs ; they will look to me, and I shall look to the producent." In *Handley and Jones v. Edwards*, (b) the Court held that such a liability disqualified a witness.

The Court being of opinion that the witness was incompetent.

Addams and *Robinson* prayed that the witness might be re-produced, and upon his being released,

(a) See *ante*, p. 453.

(b) Vol. 1. p. 722.

repeated to his deposition. In the case of *Harrison v. Lane*, the same objection was raised, and it was cured by the Court rescinding the conclusion of the cause, in order that the witness might be released and re-examined. The proctor is ready to release the witness in this case.

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The *Queen's Advocate* and *Haggard*. The evidence having been seen, it is dangerous to allow a witness to be re-examined; he can now shape his testimony to the exigency of the case. The application should have been made earlier, before publication. The proctor produced this witness with a full knowledge of his incompetency.

The minute of the Court, in *Harrison v. Lane* (7th May, 1830), being referred to, it appeared that the Court rescinded the conclusion of the cause, and gave leave to the proctor to re-produce the witness "*for the purpose of his being re-sworn, re-examined, and again repeated to his deposition.*"

SIR HERBERT JENNER.

Upon this precedent, the Court will, on this occasion, rescind the conclusion of the cause, for the purpose of allowing Mr. Lane to be re-sworn and re-examined; but the Court will not consent in future (except in special cases) to rescind the conclusion of a cause for the purpose of re-examining a witness under similar circumstances. It must be considered to be a rule of this Court, till reversed by a superior Court, that a person responsible for the proctor's costs will not be considered a competent witness, and consequently his evidence will not be admitted; and that it is not

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competent to a party to wait till after publication of the evidence before he releases the witness, and then to apply to have the conclusion of the cause rescinded. The release must be made at the earliest opportunity, before the witness is examined, —this must be considered as the rule of the Court.

The case must stand over for the re-examination of the witness; his original deposition must be retained in the office. (a)

(a) In the case of *Carter v. Rolph and Clark*, (16th December 1840.) the same course was followed with respect to the drawer of a will, who, by retaining the proctor, had rendered himself liable for his costs. The motion for rescinding the conclusion of the cause was opposed, on the ground that no responsive Allegation was given in by reason of the known incompetency of the witness. Notice of appeal was given in this case.

CONSISTORY COURT OF LONDON.

BAKER, JEPP and Moss against THOROGOOD.

1840.

Nov. 10th.

Under the stat. 3 & 4 Vict. c. 93, enabling the judge of an Ecclesiastical Court, in a suit for church-rate not exceeding 5*l.*, to discharge a party from custody, who had suffered imprisonment for six months and upwards, upon payment of the rate and "the costs lawfully incurred by reason of the custody and contempt of such party," costs in the Ecclesiastical Court only are intended.

This was a suit for subtraction of church-rate, brought by the Churchwardens of Chelmsford, Essex, against John Thorogood, an inhabitant, for the recovery of two rates, amounting to 9*s.* 2*d.* The defendant had refused payment, and, neglecting to appear to the citation, had been pronounced in contempt, and a writ *de contumace capiendo* having issued, he was, in the early part of 1839,

for six months and upwards, upon payment of the rate and "the costs lawfully incurred by reason of the custody and contempt of such party," costs in the Ecclesiastical Court only are intended.

committed to prison, where he still remained. Since that date, the Act 3 & 4 Vict. c. 93, had passed, (a) which enacted, that it shall be lawful for the judicial committee of the Privy Council, or the judge of any Ecclesiastical Court, if it shall seem meet to the said judicial committee or judge, to make an order upon the gaoler, sheriff, or other officer in whose custody any party is, or may be hereafter, under any writ *de contumace capiendo* already issued, or hereafter to be issued, in consequence of any proceedings before the judicial committee or the judge, for discharging such party out of custody; provided that no such order shall be made without the consent of the other party or parties to the suit; provided that, in cases of subtraction of church-rate for an amount not exceeding 5*l.*, where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other parties to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of such party shall have been discharged, and the sum for which he may have been cited into the Ecclesiastical Court shall have been paid into the Registry of the said Court, there to abide the result of the suit.

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The *Registrar* reported the bill of costs in this cause at 16*l.* 13*s.* 8*d.*

The *Queen's Advocate*, for the Churchwardens, I understand that the costs taxed by the Registrar,

(a) 10th August, 1840.

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(at whose instance I am not aware ; (a) for it does not appear that there is anybody before the Court against whom an objection could be taken, and who would be liable to the costs of an act on petition), are the costs of the proceedings in the Ecclesiastical Court. But the question is, what are the "costs lawfully incurred by reason of the custody and contempt of the party," which must be paid before he can be discharged? Costs have been incurred in consequence of two applications to a Court of law by the party, to be liberated from imprisonment, (b) to the amount of 75*l*. Can the Court order the release of the party till all the costs lawfully incurred, in the Court of law as well as in this Court, are paid? I submit that the amount of costs lawfully incurred is 91*l*.

The Court.—Has the party been condemned in the costs in the Court of Queen's Bench?

The Queen's Advocate. Nothing passed there with respect to costs. The application was resisted by the Churchwardens successfully.

The Court.—I have no means of ascertaining what the costs in the Court of Queen's Bench are.

The Queen's Advocate. John Thorogood has.

(a) The rate and costs were paid by an individual, or by individuals, who desired to remain unknown to the defendant.

(b) In June, 1839, a writ of *habeas corpus* was applied for to one of the judges of the Court of Queen's Bench, and refused. In May, 1840, a rule was obtained in that Court, calling upon the Churchwardens to shew cause why the writ *de contumace capiendo* should not be superseded, but which was discharged.

JUDGMENT.

DR. LUSHINGTON.

I am now, for the first time, to carry into effect a new Act—totally different from any other,—passed with a view of authorizing the release of a person in custody, and in consequence it becomes the duty of the Court to be guided by the true meaning of the Act.

In order to ascertain the true construction of the statute, I think it necessary, in the first instance, to consider the state of the law prior to the passing of it, and then to see how far the law has been altered by the statute.

The person committed in this case for contempt was sued in the Ecclesiastical Court for church-rate, a subject over which the Court had undoubted jurisdiction. He refused to appear, or to submit to the judgment of the Court; he was consequently pronounced in contempt, his contempt was signified, and he has been for a considerable time past in custody. If no such statute had passed, the course of proceeding would have been this: The Court would have been called upon, at the instance of the party imprisoned for contempt, to allow his contempt to be purged, and that could only be done on the payment of the costs incurred in this Court in consequence of his contempt, and on his taking the usual oath to submit to the lawful commands of his Ordinary. Now, let us see whether, under these extraordinary circumstances, the Court would have required anything more to be done on the part of Mr. Thorogood. Suppose application had been made, either for a writ of *habeas corpus*, or for the purpose of quashing the writ *de contumace*

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capiendo, to a Court of common law, and that Court had been of opinion that the Consistorial Court of London had properly exercised its jurisdiction, and it had refused the application; unquestionably, the other party must have incurred certain costs. Now, whatever those costs may have been, it is perfectly clear that, previous to this statute, I could have taken no cognizance of them at all; because the proceedings would have been before another jurisdiction, which was alone competent to decide whether a party was liable to the costs, and to cause the costs to be paid. I now consider the provisions of the present statute, and to what extent it has altered the antecedent law.

I have observed that, prior to the passing of this statute, it was requisite for a party to submit himself to the jurisdiction of the Court, and to take an oath of obedience. I apprehend that, unless under very peculiar circumstances, it would not have been competent to this Court to allow a party to purge his contempt without taking the oath of obedience. This is a question which I have endeavoured to investigate to the utmost of my ability, and I do not find that it has ever been done, unless under very peculiar circumstances. This having been the state of the law, what change has been made by the present Act? It empowers the judicial committee of the Privy Council, or the judge of an Ecclesiastical Court, if it shall seem meet to the said committee or judge, to make an order for the discharge of a party out of custody; so that the Act confers a discretionary power, which the Court, under ordinary circumstances, had no right to exercise. It then provides that no such order shall be

made without the consent of the other party : that is, that the Court can dispense with the oath of obedience if the other party consent. The next proviso, which is applicable to the present case, is, "that, in cases of subtraction of church-rate, for an amount not exceeding 5*l.*, where the party in contempt has suffered imprisonment for six months and upwards, the consent of the other party to the suit shall not be necessary to enable the judge to discharge such party, so soon as the costs lawfully incurred by reason of the custody and contempt of the party shall have been discharged, and the sum for which he may have been cited into the Ecclesiastical Court, shall have been paid into the Registry of the said Court." The effect of this proviso is to give the Court a power, where these circumstances concur, namely, in a church-rate case, where the amount does not exceed 5*l.*, and the party in contempt has been imprisoned for six months ; to discharge the contumacious person without the consent of the other party ; but it requires that the costs lawfully incurred by reason of such custody and contempt shall be previously paid. The question then, is narrowed to this : Whether the costs taxed by the Registrar are the costs intended by the statute ; or whether I am bound to take into my consideration the costs alleged to have been incurred in the proceedings adverted to by the Queen's Advocate ?

I think it is obvious that, "costs lawfully incurred by reason of the custody and contempt," must mean, primarily at least, costs incurred in this Court ; because it is over such costs alone that this Court had jurisdiction before the passing of the Act ; and it is with respect to these costs alone

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that this Court has the means of ascertaining their due and proper amount. It would be singular if this Court had conferred upon it the extraordinary power of ascertaining, and not only of ascertaining, but of deciding upon a party's liability to the costs in another Court. I do not know, in this case, whether the Court of Queen's Bench has condemned the party in the costs, or what is the amount of the costs, if it has so condemned him, and I do not possess the means of ascertaining either question. Again, it would be singular if this Court should be invested with the power of keeping a person in prison till the costs in another Court were paid, that other Court being invested with power infinitely superior, and able to exercise it, for enforcing the payment of any costs it may condemn a party in. Therefore, it does appear to me, that, unless the words of the statute were so extremely strong as to leave the Court in no doubt as to their meaning, I should act most in accordance with the ancient practice of these Courts if I were to confine their meaning to the costs incurred in this Court. I do not think, indeed, that it is consistent with the object and intention of the Legislature that these words should include the costs of an opposition to an application for a writ of *habeas corpus*, or for a rule to quash a writ *de contumace capiendo*.

Then the single question is, what I ought to do in this case with reference to the discretionary power conferred upon me by this statute. The amount of the rate sued for is 9s. 2d. It is admitted that the party, not only refusing to pay but setting the authority of the Court at defiance, has been in prison for a period twice the length of

time mentioned in the Act. In exercising the discretion conferred upon me by the statute, I must act according to its true meaning and intention, without reference to any opinion which may be entertained as to the propriety or impropriety of the conduct of the party in any part of the case. I think it is clear, from a perusal of the Act, that under ordinary circumstances, considering that the amount of rate sued for in this case is considerably under 5*l.*, and that the party has been imprisoned for much longer than six months, the Court (unless under very peculiar circumstances) is bound by the words of the Act, and will, in this case, exercise a just discretion in directing the party to be released from confinement.

The course I shall adopt is this : on the amount of the costs, as taxed by the Registrar, being paid into Court, and also the charge incurred for the warrant, and also the amount of the rate sued for, as stated in the libel, to direct John Thorogood to be released from prison, without any further order.

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PREROGATIVE COURT OF CANTERBURY.

1840.

In the goods of HENRY HARDINGE, *deceased*.

Nov. 14th.

The Court granted administration to the sister of a bachelor intestate, upon a proxy of renunciation from the mother (a married woman) without her husband joining in it, she living separate from her husband, and all right to the estate and effects of the deceased having been conveyed to her under a deed of separation.

Henry Hardinge, late of Bangalore, in the presidency of Madras, in the East Indies, a lieutenant in the 39th regiment of foot, died on the 8th of June, 1839, a bachelor, and intestate, without a father, leaving Elizabeth Caulfield (wife of Daniel Caulfield), his lawful mother and next of kin.

The said Elizabeth Caulfield is now and has been for some time past living separate from her husband, a deed of separation having been entered into between them. Under that deed, it was agreed that she should receive and retain for her own sole and separate use, independent of the debts, control, and engagements of her said husband, all her wearing apparel, jewels, &c., also the pension to which she was entitled as the widow of Lieutenant Colonel Hardinge, deceased, and also all other the income and property whatsoever to which she or the said Daniel Caulfield in her right, or through her, was entitled, or during their joint lives might become seised, possessed of, or entitled to, except certain settled property, not including her interest in the personal estate and effects of the deceased.

Mrs. Caulfield had, in her own name, executed a proxy renouncing her right to the letters of administration of the effects of the deceased, and con-

sented that the same might be granted to Parnell Hardinge, the sister of the deceased.

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In the goods of
HARDINGE,
deceased.

Haggard, under these circumstances, prayed administration to be granted to the sister without the husband's joining in the proxy, he having no interest in the property of the deceased; citing the case of *Jeffreys, deceased*, 15th January, 1835, which was precisely similar.

The COURT, after directing that case to be looked up, granted the administration as prayed.

EDMUNDS *against* UNWIN.

On Petition.

1840.

June 6th.
Nov. 21st.

This was originally a cause of proving the will of Mr. Rowland Unwin, deceased. The Court pronounced for the will, and directed the costs of Mr. Edward Unwin, the brother, and one of the next of kin, the opposer of the will, to be paid out of the estate.

The *Registrar* reported the bill at 563*l.* 7*s.* 1*d.*

The proctor of Mr. Unwin objected to the report, and an act on petition was entered into.

When the costs of a party opposing a will are directed to be paid out of the estate of the party deceased, such costs are taxed not as between proctor and client, although more *liberally* than between party ~~liberally than~~ and party.

The *Queen's Advocate* and *Addams*, in objection to the report. The question is, as to the mode of taxing expenses, and the object is to settle the principle on which the proctor's bill should be taxed. The principle ought to be as between practitioner and party, and not as between party and

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party, the principle which the Registrar has adopted. The terms of the sentence are "the expenses to be paid out of the estate:" that means the fair expenses of the suit, not only in the proctor's own office, but in all necessary matters. It is proper, for the interests of the public and the purity of our proceedings, that these expenses should be under the direction of a practitioner of this Court, the *dominus litus*. (a) The practice has been to tax costs to be paid out of the estate as between proctor and party. Suppose it is an executor's duty to bring a will before the Court, and the Court should be of opinion that he had done his duty by so doing, if he recovered only a part of the expenses, as between party and party, he would be out of pocket. The Court, when it directed the expenses of the opposing party to be paid out of the estate, in effect told the proctor, instead of taking his bill to his party (Unwin), to take it to the executor. The question is, what bill? The same bill which the proctor would have presented to his party. In order that the executor may know the sum that he is to pay, it is referred to the Registrar, not for taxation, but to report on the fairness and reasonableness of the charges, that is between proctor and client, not between party and party. The Registrar has no jurisdiction to tax costs but where costs are decreed. The true principle is stated by Mr. Swabey, Mr. Sharpe, and Mr. Pulley. (b)

(a) *Mynn v. Robinson*, 2 Hagg. E. R. 195, reference was also made to the evidence of Dr. W. Adams, p. 146 of the Report of the Ecclesiastical Commissioners.

(b) They made affidavits to the following effect:—

Mr. Swabey deposed, that he was the deputy-registrar attending the judicial committee of the Privy Council on hearing of Ecclesiastical

Nicholl for the executor. The representatives of this estate must administer it under the directions of the Court of Chancery, and can only pay legal charges. The argument on the other side goes only to this extent, that it is desirable that the Court should have the power of charging these expenses to the estate; but the question is, whether the Court has power to exercise such a jurisdiction?

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and Admiralty appeals to her Majesty in Council, that he was also one of the deputy-registrars of the late High Court of Delegates, and in which two capacities he had acted for twenty-nine years and upwards. That ever since he had discharged the duties of the said office, and also during the whole time he was one of the deputy-registrars of the late High Court of Delegates, it has been the practice of himself and the other deputy-registrars, to tax costs as were decreed to be paid out of the estate of a party deceased, as between party and practitioner, as well with regard to proceedings in the aforesaid Court, as to expenses previously incurred in this Court and other Courts from whence such appeals came.

Mr. Pulley deposed, that in 1815, in the case of *Hoare and Blencowe* against *Etheridge*, he was proctor for the defendant, that the suit went to a hearing, and that his party's costs were directed to be paid out of the estate of the party deceased; that various objections were made to his bill of expenses by the adverse proctor, and the same were referred to the three deputy-registrars, who were, as he well remembered, unanimously of opinion, that the Court having decreed the expenses of his party to be paid out of the estate, he was entitled to have such expenses taxed as between party and practitioner, that the same were taxed accordingly, and afterwards paid.

Mr. Sharpe deposed, that in 1816, the late Mr. Moore was retained as proctor to conduct a suit in this Court respecting the will of the late *John Scarnell*, which suit went to a hearing, and the judge pronounced for the validity of the will, but decreed the expenses of George Scarnell, one of the parties opposing the will, to be paid out of the estate of the deceased. That he as clerk to Mr. Moore, attended the deputy-registrar in the taxation of the said expenses, and he well remembered the deputy-registrar distinctly saying, that, under the decree of the Court, it was his duty to tax such expenses as between proctor and party, although the deponent strongly objected thereto, nevertheless the said expenses were accordingly so taxed, and afterwards paid.

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against
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The decreeing of costs out of an estate is a modern practice; at the beginning of this or the end of the last century, it was doubtful, until the decision in the Court of Delegates in *Passy v. Heming*,^(a) which gave this Court authority to decree costs out of an estate as against a party with adverse interest. Even if the Registrars may have acted on a different principle, the practice may be novel and incorrect. This Court having no jurisdiction to order or enforce costs between practitioners and client,

The Court.—Do you contend that?

Nicholl. I mean on the general principle, as the Court has no power to interfere, except in cases of exorbitant charges, or where the proctor's conduct is called in question, and it proceeds against him *ad publicam vindictam*. The Court has no jurisdiction to enforce the payment of a bill delivered by a proctor to his client; he must proceed to recover it as a tradesman's bill.

In the next place, how can this Court exercise any further jurisdiction? The equity and common law Courts have full jurisdiction as to costs, not only between party and party, but between attorney and client. A Court of Equity can order costs to be taxed in any way it may think fit; but I cannot find any instance in which the Registrars have ever taken upon themselves any taxation of costs out of the estate, as between proctor and client, without the express direction of the Court.

Suppose an executor, representing an estate, had propounded a paper, and after probate, a legatee

^(a) Note to *Dean v. Russell*, 3 Phill. 334.

came forward and satisfied the Court that the executors had been guilty of fraud towards him in so doing, and the Court should be of opinion that the executor ought to be condemned in the costs ; all the costs the party could recover would be the costs as between party and party ; and why should an executor and residuary legatee acting honorably be exposed to greater costs ?

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June 6th.

 EDMUNDS
 against
 UNWIN.

The Court.—The executor propounds a paper on behalf of the party. The principle on which costs are given out of the estate arises from something having been done by the testator himself.

Addams. If the Court has power to order costs to be paid out of the estate, has it not the power to enforce it ? The one follows the other.

The Court wished to have the cases and practice inquired into.

JUDGMENT.

SIR HERBERT JENNER.

This is a petition in objection to the Registrar's report of the costs due to the party opposing a will, under the order of the Court, which was of opinion that he was entitled to have his costs paid out of the estate.

Nov. 21st.

The act on petition states the rule in such cases to be this ; that where costs are directed to be paid out of the estate, the principle of taxation ought to be that adopted in the case of practitioners and client ; in other words, that the party ought to be considered in the same light as if he employed the proctor on the other side ; that, accordingly, costs of all description which he may have incurred ought to be

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charged to the estate. On the other hand, it is contended, that whenever costs are paid out of the estate, it is the same as if a party were condemned in costs,—in short, that the principle of taxation ought to be that as between party and party.

The Court is not prepared to accede to either of these positions; that all costs which may fairly be charged by a proctor to his client are to be charged in such cases to the estate, or that the strict principle of taxation between party and party is to be the test of the costs to be allowed. I see many inconveniences if the Court were to hold that the whole costs were to be paid out of the estate,—that is, the full costs between the proctor and his client, because a client may direct his proctor not to take any step whatever in the cause without consulting counsel, which may be prudent and proper; but as the other party has no means of checking the number of consultations, it would be very hard if a party entitled to the property were to be saddled with costs of this description. On the other hand, it would lead to great inconvenience, and in some cases to great injustice, if the Court were to hold that the strict mode of taxation should be followed as between party and party.

The Court is not inclined to go into the particular items in this case; but it will refer to one or two of them, to show that the proper mode of taxation, where costs are directed to be paid out of the estate, should be by a more liberal test than between party and party; and still not to so wide an extent as between proctor and client.

One item is a charge made for attendance in the neighbourhood of the habitation of the deceased, during his lifetime; and where the sanity of the

deceased is the point at issue, it may be necessary to see a number of witnesses, and learn the nature of the evidence they could give; and the Court had considerable doubt on this point, whether such costs were proper to be allowed, considering that the conduct of the cause should be with the proctor and not with any other agent. But the Court was of opinion that it would be better (unless any precedent were found) not to permit such charges against the estate, but to suffer them to be defrayed by the party employing the proctor; for it is clear that, in many cases, great abuses might be practised by parties, who may think proper to bring forward a vast number of witnesses, more than was necessary, or whose evidence had no bearing on the question before the Court.

I have looked for, and have requested to be furnished with, cases in which such charges have been allowed; and two cases have been furnished to me, in which it would seem that there had been charges of this kind in a proctor's bill. One (which was mentioned in the argument), is that of *Hoare and Blencowe v. Etheridge*, in 1815, in which I find that charges for attendance of the proctor, for the purpose of seeing witnesses, were apparently allowed and paid to the proctor; but I do not collect, from an inspection of the bill itself, whether there was a regular taxation, and attendance before the Registrar, or whether there was an agreement between the parties. I do not find any decree for costs out of the estate; but from my recollection of the case, if I do not mistake, it was a case in which a legatee propounded three codicils, of which the executor declined to take probate, and the Court having pronounced for the codicils, thought that the per-

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son discharging the duty of the executor stood in the same position as the executor himself would have stood, if he had propounded them, which is a very different case from that where a party opposes a will for his own interest. The other case was that of *Armstrong v. Armstrong*; but that case does not support the proposition, for the Court decreed the whole costs against the party. The Judicial Committee thought this Court was wrong in that respect, and reversed its sentence so far as the condemnation of the party in the whole costs; and on looking at the bill, I find no charges by the proctor for attending to see the witnesses at Hertford and his travelling expenses—all those charges were taken out of the bill, and not allowed by the Registrar of the Judicial Committee. Being taken off the bill and disallowed, this disproves the existence of such a rule for allowing such charges against the estate. The Court does not mean that these are improper charges; they are quite reasonable and exceedingly proper charges; but they should fall upon the party employing the proctor and producing the witnesses, and who sent the proctor down to different places to procure evidence. They are expenses which should be reimbursed to the proctor, but are not, under all circumstances, to be charged to the estate. I am, therefore, of opinion, that although such charges are proper to be incurred, and the cause is benefitted by the inquiries being made by the proctor rather than by a person over whom the Court has no control, they are not such as, under all circumstances, are to be allowed as against the estate.

With respect to the other costs, the Court has no doubt, except as to one point. When a charge is

made for acts done, which, under ordinary circumstances, is limited to a certain sum, in the usual course of taxation, I do not know that the Court has any power to increase it, and give a different sum for the same acts. It is a different case where a certain sum, to be paid by the estate, is calculated as between party and party; but it is difficult to say that a particular act is to be done for which a certain sum is payable, and that sum may be increased. Having a control over the acts of proctors, but no control over these charges, and having no means of enforcing the payment of their costs (which must be recovered by an action at law), the Court does not feel itself at liberty to allow such charges to be paid at a higher rate. The charges may be all fit and proper to be made, and the Court does not intend to intimate an opinion that the charges are improper; but it has no means of controlling these charges, and this being the case, it cannot take a different scale of remuneration in one case from another.

Looking at all the circumstances of the case, it appears to me that the taxation which has been made is fit and proper to be sustained. All that has been done is fair and just; but I have no precedent before me which leads me to believe that it has been the course and practice of the Court to allow against the estate the proctor's charges of attendance at the place of the deceased's residence, and although it is fair and reasonable that those charges should be incurred, it is not, in my opinion, fit and proper that they should be paid out of the estate, since it might possibly lead to an abuse of the general practice of the Court.

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1840. I have little doubt of the power of the Court to
 Nov. 21st. compel the payment of the costs due to the party
 EDMUNDS out of the estate. I pronounce for the sum reported
 against by the Registrar.
 UNWIN.

1840.

Nov. 14th
 and 21st.

GLADSTONE *against* TEMPEST and Others.

Cheques written in 1833 by the deceased upon his bankers, but not intended to have effect until after his death, pronounced for as part of the testamentary disposition of the deceased; he having in 1834, formally executed a will, disposing of the whole of his property, and containing a full clause of revocation.

This was originally a cause of proving the last will and testament of Charles Robert Blundell, Esq., late of Ince Blundell, Lancashire, who died in 1837, contained in several testamentary papers. He left behind a very large property, real and personal, amounting to 300,000*l.*, which was disposed of by a will dated in 1834. This will, with two codicils, was propounded by Mr. John Gladstone, the surviving executor, against Elizabeth Tempest, widow, the sister and next of kin of the deceased, and Lord Camoys and Sophia Charlotte Stonor, widow and representative of Charles Henry Stonor, deceased, his nephews. After the attesting witnesses had been examined in support of the will, the opposition to the will was withdrawn, in consequence of a verdict found in favor of it in an action at law. And it was admitted that it was sufficiently established. The two papers propounded as being part of the will were, however, opposed by the residuary legatees, Dr. Walsh and Dr. Branston, who had intervened in the suit. These two papers bore date in September, 1833, and were in the form of drafts or orders on the deceased's bankers, to pay 500*l.* to a person named Hall, a servant who had lived with him for some years, and 300*l.* to his housekeeper, Ann Harris, and it was pleaded that they were delivered by the deceased shortly after they were

written to the parties, sealed up, endorsed in his own handwriting, and addressed to the bankers, and directed to be presented by Hall and Harris. The papers, it was pleaded, remained in the possession of these parties till after the death of the deceased, shortly after which they were presented to the bankers, who declined to pay them.

The case was argued on the second session of Michaelmas Term ; the *Queen's Advocate* and *Philimore* in support of the cheques as part of the will ; *Addams* and *Curteis* *contrà*.

JUDGMENT.

SIR HERBERT JENNER.

It is pleaded that the testator delivered these papers to the parties, Hall and Harris, sealed up, and told them that they were not to be presented till after his death ; but as to what actually passed between the deceased and them, no evidence could be produced. That they were sealed up and remained so until they were produced to the bankers, are the only circumstances to lead the Court to conclude whether they are to be regarded as testamentary, or as gifts *inter vivos*. The form of the papers is not testamentary ; but they were delivered by the deceased (as the Court must assume) sealed up, and they were not to be made use of at the time when they were delivered. It is true, nothing was said as to whether they were to be presented during his life or after his death ; still, I think it is clear that payment was to be postponed for some time, and the question is, were they intended to have effect and operation before death or after ? I have no difficulty in saying, it appears to me that it was intended by the deceased that they should not have

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effect during his life, but were to be paid after his death, and although he may not have originally intended them as part of his will, yet they may be pronounced for as part of his will. This has been done in various cases; a paper clearly not intended as a part of the will of a testator, not on the face of it testamentary, yet, where it was not to have consummation till after his death, has been held to be part of his will, if not revoked by subsequent acts. In this case, I have no doubt that the deceased did intend the money to be paid without reference to his executors; still, as the effect of the papers was to be consummated on his death, they are to be considered as a part of his testamentary disposition.

The next point is, whether they are revoked by any subsequent act. Now this question may be decided by the construction of the will simply, without reference to any clause of revocation: there may be other legacies substituted for those given by these two papers, and this question may be in some degree solved by reference to an intended substitution of other legacies, or by reference to the former part of the deceased's testamentary life.

The deceased executed a will in the year 1827, and by that will it may be seen that he had given an annuity of 100*l.* to Hall for life, and in 1833, he also gave him the sum of 500*l.* Now it is quite clear that the 500*l.* could not be considered a substitution for the annuity of 100*l.*, and, therefore, if the deceased had died without executing the will of 1834, or doing any other act, the party would have been entitled to the 100*l.* a-year, and also to the 500*l.*, given by the codicillary disposition contained in the paper of 1833. It shews at this time an increasing regard for his servant for the continuance

of his services. But it appears that, in 1834, the deceased by will gave him an increased annuity—augmenting the annuity of 100*l.*, given by the will of 1827 to 200*l.*; and the question is, whether this increase was a substitution for the sum of 500*l.*? I am of opinion, that it cannot be taken to have been the intention of the deceased to revoke the legacy of 500*l.* by this additional annuity of 100*l.*; that he intended that both should operate, and that the party should have the benefit of the 500*l.*, as well as the increased annuity, though perhaps the deceased did not intend that both should operate in the way of testamentary disposition, but that the sum should be paid by his bankers without the intervention of his executors. Looking to the intention of the deceased (which is all the Court can look to), it is not the substitution of a legacy *ejusdem generis*—one is an annuity, the other a specific sum; and there is nothing to lead the Court to believe that it is improbable that he should have given this in addition to the sum of 500*l.*

With regard to Harris, there was no provision for her in the will of 1827; but in 1833, he gives her this specific legacy of 300*l.*, that was all the provision he made for her at that time. But, in the will of 1834, he gives her an annuity of 60*l.* for life, and there is no ground for supposing that the deceased intended that this annuity should be a substitution for the 300*l.* I am of opinion that it was no substitution.

But there is a clause of revocation in the will of 1834, and generally speaking, there is no doubt that by such a general clause there is a revocation of all prior testamentary acts. But it has been over and over again laid down, that probate of a

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paper may be granted of a date prior to a will with a revocatory clause, provided the Court is satisfied that it was not the deceased's intention to revoke that particular legacy or benefit. In this case, I have said, it is probable that the deceased did not intend that these papers should form any part of his will, and he intended to revoke such dispositions only as were contained in a will or codicil. I am of opinion, that the deceased did not intend to revoke these bequests, and although he was not in possession of the papers at the time, he could not have forgotten that he had sealed them up, and directed that they should be presented to his bankers at some time or other. In the case of *Denny v. Barton*, (a) where there was a letter to the executors directing the payment of a legacy, and a clause of revocation in the will, it was held that the legacy was not revoked by a general revocatory clause.

With regard to the intention of the deceased, if he intended to revoke these bequests, it is extraordinary, as he could not have forgotten the papers, and that he had delivered them to the parties, that he should not have taken some steps to recover them or to apprise his bankers of the substitution he had made for the legacy he had intended to give by them.

I am of opinion that these papers are sufficiently established as the act of the deceased, that they are testamentary ; that they are not revoked, and therefore, that they are entitled to probate as part of the will of the deceased.

(a) 2 Phill. 575. *Lynnhurst*
Vice Chan & afto 2^d Chan. held that the later
 bequests were a substitution & that
 the previous ones were revoked.
Ch of Chan.
Nov 21 - 1843.

In the Goods of JOHN PERRY.

Motion.

1840.

December 3rd.

This was an application on behalf of the executor of an executor, to be allowed to renounce the probate of the will of the first testator, before taking probate of the will of the second testator. According to the ordinary practice of the office, the executor of an executor becomes, on taking probate of his will, the executor of the first testator.

An application by the executor of an executor to be permitted to renounce the execution of the former will and take probate of the latter rejected.

Nicholl, in support of the motion, submitted that, in principle, there could be no objection to such renunciation, although it might be contrary to the practice. In Williams' *Law of Executors* (a) it is laid down, that the executor of an executor may take the administration of the effects of the second testator, and refuse that of the first. The authorities referred to are *Touchstone* and *Wankford v. Wankford*.

SIR HERBERT JENNER.

It has been for many years the practice in this Court, that an executor, taking probate of the will of an executor, becomes executor of the will of the first testator, and is not permitted to renounce probate of the first will, and take probate of the second. I am not aware of any instance of departure from this rule, and unless there be some clear principle or authority, the general rule of practice must be observed.

Motion rejected.

(a) Williams' *Law of Executors*, vol. 1, p. 200. Third edition.

In the Goods of DAVID ROGERSON.

Motion.

1840.

Dec. 3rd.

Administration
of the effects
of a domiciled
Scotchman
granted to the
brother, (the
next of kin of
the deceased)
without citing
the widow, a
similar grant
having been
already made
in Scotland.

The deceased, a domiciled Scotchman, died 20th July, 1840, intestate, leaving a widow and an only brother. By the law of Scotland, the widow, though she would take half the property, (the brother taking the other moiety) would not be entitled to the administration, the brother being the person to take administration. A grant of administration of the effects in Scotland had been decreed to the brother by the Commissary Court at Dumfries.

Jenner, in support of the motion for a grant of administration to the brother, cited the case of *Isabella Stewart*. (a)

SIR HERBERT JENNER.

If there had been no grant in Scotland, and this had been a motion for an original grant, the Court would have hesitated whether it would have granted administration to the brother in preference to the widow; but as the Court in Scotland has decreed administration to the brother, this distinguishes it from other cases, and it would be too much for the Court to hold itself debarred from the exercise of the discretion given to it by the Act of Parliament. It is for the benefit of the estate that there should be the same administration in Scotland and in England; and it is in my opinion a very proper case for the Court to exercise its discretion, and to decree administration to the brother without calling upon the widow to shew cause why administration should not be granted to him.

(a) Vol. 1, 904.

In the Goods of ALFRED SHIRLEY.

1841.

HILARY TERM.
Jan. 15th.

Alfred Shirley died on the 6th of September, 1840. He left a will dated in 1806. In 1839 he married his present widow, who had had no child, and who stated in an affidavit that she was not *enceinte*.

Probate allowed to pass of a will made previously to 1st of January, 1838, the testator having married in 1839, as unrevoked by stat. 1 Vict. c. 26, s. 18.

A doubt having arisen in the registry whether or not the will was revoked under the stat. 1 Vict. c. 26, s. 18.

Addams prayed administration with the will annexed to the widow: he submitted that the will was not revoked, the 34th section of the stat. 1 Vict. c. 26, declaring that the "act shall not extend to any will made before the 1st of January, 1838."

If the statute were held to apply to such a case, see the consequences.

The 7th section enacts, that no will of a person under twenty-one shall be valid.

By the 9th, every will must be signed and attested.

By the 15th, a legacy to an attesting witness is void.

By the 18th, a will is revoked by marriage.

By the 20th, a will can be revoked only by certain acts.

By the 21st, unattested alterations can have no effect.

By the 22nd, no will revoked can be revived except by certain acts.

Then the 34th section enacts, that the act shall "not extend to any will made before the 1st of

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January, 1838," not that it shall not come into operation before that date.

Suppose the act had contained only two clauses, one enacting that the will of a single person should be revoked by marriage, and the other that the act should not extend to any will made before the 1st of January, 1838—would a will made before 1838 be revoked by marriage?

The 34th section also enacts, "that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived."

Supposing the act did apply notwithstanding the 34th section, see the consequences. A person in his minority makes a will, and after the 1st of January, 1838, makes a codicil, which would bring down the date of the will to that of the codicil, and consequently under the 7th section revoke the will. Again, a person makes his will before 1838, leaving his property to an attesting witness, and after the 1st of January, 1838, executes a codicil, which making the will speak from the date of the codicil would, under the 15th section, make the will void.

The act is not clearly expressed, but these results could never have been intended.

SIR HERBERT JENNER,

The Court has held that with regard to alterations in any will after 1838, they must be made with reference to the provisions of the act; but as to the present point, I am inclined to agree with the learned counsel as to the construction of the act, I think that the present will is not revoked.

99.

It is unfortunate that questions of this sort should arise in this shape where the Court has no opportunity of having the case argued.

1841.

HILARY TERM.
Jan. 15th.

In the Goods of
ALFRED
SHIRLEY.

GRAHAM v. MACLEAN.

Petition.

1841.

Jan. 20th.

Roderick James Maclean, Esq. late a major in the 3rd Regiment of Foot, died at Boulogne on the 9th of May, 1836. By his will, dated February, 1836, he appointed his brother James Maclean, and Alexander Bain, Esquires, executors and residuary legatees in trust, and guardians of his only child, a daughter, whom he named residuary legatee on her attaining the age of twenty-five years, or marrying previously with the consent of her guardians. By a codicil of the same date as the will, he directed some property in the French funds to be transferred into English securities, in the name of his daughter. The testator at the time of his death was alleged to be indebted to the firm of Mackintosh & Co., of Calcutta, in the sum of 5000*l.* and upwards. Mackintosh & Co. having become bankrupt, J. W. Alexander, Esq. of Calcutta, was appointed assignee of their estate, and he executed powers of attorney in order to enable Thomas Graham, Esq., of Mitre Court, Temple, to recover the debts due to Mackintosh & Co. The assets of the testator, including Dutch bonds transferred into the name of his daughter, amounted to about 3,200*l.*

Administration with will annexed (the executors and residuary legatees in trust having renounced) granted to the attorney resident in this country of the guardian elected by a minor sole legatee resident abroad, in preference to the attorney of a creditor.

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GRAHAM
against
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In 1840, no steps having been taken to prove the will a decree was extracted at the instance of Mr. Graham, calling upon the executors to prove the will, and in case of their renouncing, calling upon the daughter to accept or refuse administration with the will annexed, or shew cause why the same should not be granted to him (Graham).

The executors renounced ; the daughter, who was a minor of the age of sixteen years, having elected as her guardian, Mrs. Smith, a lady residing at Bruges, under whose care she had been placed by the testator in his lifetime, administration with the will annexed was prayed by an attorney of Mrs. Smith, for the use and benefit of the daughter, and until she should attain the age of twenty-one years. The attorney of the creditor objected to this grant, and prayed to be heard on his petition against it.

Haggard, in support of the petition on behalf of the creditor. The administration in this case is in the discretion of the Court. The Court is not bound by the statute, nor is the Court bound to accept the guardian elected by the minor—here the daughter has chosen as her guardian the lady with whom she is residing abroad, and who has appointed a gentleman also resident abroad, her attorney, for the purpose of taking this administration ; it is true, that the daughter was placed by the testator under the care of this lady, but the lady was then unmarried, and if the Court accepts this election, the husband of this lady will, in effect, be the guardian, a person probably wholly unknown to the deceased. It would further not be advantageous to the estate to grant the administration as prayed, for

part of the property claimed by the creditor as belonging to the deceased (the Dutch bonds), are said by this person to be the daughter's property.

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Addams, contra.

In the first place, the party before the Court has no right to oppose the issuing of this administration, the power of attorney is in as general terms as can possibly be, there is no authority to apply for administration to this deceased or any other; had no appearance been given to the decree, it is doubtful whether this power of attorney would have enabled the party to take the administration, but it is clearly insufficient to authorise the party to oppose the grant of administration to the daughter.

But granting that the authority is sufficient—still the Court by its universal practice never grants administration to a creditor while a party having a prior title is ready to take the grant. It is said, that this administration is in the discretion of the Court, certainly the Court is not bound by the statute, but the discretion is not an arbitrary discretion, but is subject to established rules and practice. Again, it is said that the Court is not bound by the election of the guardian; true, if any objection exists to the person elected, but here nothing is alleged against this lady.

SIR HERBERT JENNER.

The question in this case respects the grant of administration to the estate and effects of Roderick James Maclean, who died on the 9th of May, 1836. He made a will and appointed executors and his daughter residuary legatee. Upon the death of the

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testator no steps were taken to prove the will, and in 1840, a decree was taken out, calling upon the executors to take probate, and in case of their renunciation, calling upon the daughter to accept or refuse administration with the will annexed, or to shew cause why the same should not be granted to the creditor. Upon that decree being returned the executors renounced, but the daughter appeared by her guardian elected by her and prayed the administration. That is objected to by Mr. Graham, as the attorney of a creditor of the deceased. Now assuming that Mr. Graham represents the creditor, he objects first to the guardian elected by the minor, that she is not in the same circumstances as when the testator confided his daughter to her care, that he probably would not have so confided her, had he expected that she would marry; but there is no proof of this, nor that this lady is an improper person to take the administration, except that she is abroad, and that is an objection, but that objection is removed by an offer on her part to appoint an attorney resident in this country to take the grant.

Another objection is, that part of the property of the deceased, consisting of Dutch bonds, was transferred into the name of the daughter, and is stated by the guardian to be the daughter's property, and a question may arise, whether these bonds were legally transferred as against the creditor, the deceased's estate being insolvent. That is a question which this Court cannot determine, and the grant of administration to the guardian will not prejudice that question, as the creditor can sue the administratrix. Although the grant of an adminis-

tration of this kind is in the discretion of the Court, it is undoubtedly the practice of the Court not to grant administration to a creditor while there is a party ready to administer who has a prior title.

Besides, there is a dispute as to the debt or its amount, and as to the interest, whether it should be English or Indian; and with respect to the power of attorney, I doubt very much whether it is sufficient to authorise the taking of the administration; although it was executed since the testator's death, there is no reference to his estate nor the taking of this or any other administration.

There is no ground, therefore, why the Court should depart from its usual course.

Petition rejected.

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ARCHES COURT OF CANTERBURY.

FIELDING *against* STANDEN *and* COOK *and* Others.

1841.

April 22nd.

In this case a decree or citation had issued from this Court, (by virtue of letters of request from the commissary of the archdeaconry of Canterbury) calling upon the churchwardens and parishioners of the parish of Headcorn in the county of Kent, to show cause why a monition should not issue against the former, requiring them to take the necessary steps towards putting the church in repair, and for providing necessaries for the decent celebration of Divine Service, and amongst other things to call a

Upon an affidavit that a parish church was in need of repair, and that the majority in vestry refused to make a rate, the Court directed a monition to issue against the churchwardens and parishioners to meet in vestry on a particular day, and make

a rate for the necessary repair of the church.

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vestry for a certain day, to be specified in the motion, for the purpose of making a rate for and towards the necessary repairs of the church, and providing necessaries for the decent celebration of Divine Service and offices therein, and for and towards the other expenses necessarily and legally incident to the office of churchwarden for the year ensuing, and against the parishioners to meet and make such rate.

This decree was served on the churchwardens and on some of the parishioners personally, and also affixing the same on the outer door of the parish church. An appearance was now given by the churchwardens, Messrs. Standen and Cook, who stated that they were ready and willing to submit to the law and justice of the Court and to obey its lawful commands.

Haggard now moved the Court to direct a motion to issue according to the tenor of the decree, on an affidavit of the Rev. Charles Fielding, the vicar of the parish, to the following effect:—"That the parish church is now, and has been for some time past, in a dilapidated state, and in urgent want of repair, and by reason of its unfitness for the performance of Divine Service, no service has, ~~been~~ for some time past ^{been} performed therein; that on the 23rd of June 1837, the church being then in need of repairs, no rate having been made for the repair thereof since October, 1835, and a balance being then due to the churchwardens, at a vestry duly held, a rate of fourpence in the pound was proposed by the churchwardens, but that the majority of the parishioners then and there assembled refused

to make a rate for such purpose ; that on the 29th of August following, a rate of threepence in the pound was in like manner refused, and on the 21st of November, 1838, a rate of fourpence in the pound ; that on the 26th of December, 1838, a survey of the church and an estimate of the expense of repairing the same were made by desire of the churchwardens, which amounted to one hundred and four pounds, and on the 18th of July, 1839, at a vestry duly held, the survey and estimate were laid before the parishioners then and there assembled, and a rate of fourpence in the pound asked for by the churchwardens for such repairs and other legal purposes, but was refused by the majority, although warned by the churchwardens that proceedings would be instituted against them to compel them to make a rate ; that on the 19th of September, 1840, a rate of sixpence in the pound was in like manner refused, and that on the 29th of that month, at the visitation of his Grace the Archbishop of Canterbury, holden at Ashford in the county of Kent, the churchwardens of Headcorne made a presentment that the fabric of the parish church was in a dilapidated state, and that they had no funds in hand to repair the same, and the parishioners had repeatedly refused to make a rate to effect the necessary repairs, whereupon Dr. Nicholl, the vicar-general of the archbishop, personally monished them to take the necessary steps towards repairing the said church ; that in obedience thereto the churchwardens did summon a vestry of the parishioners for that purpose, which was holden on the 19th of October, when a rate of

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ninepence in the pound was demanded by the churchwardens, but was refused by the majority of the vestry, a survey and estimate of the necessary repairs being laid before them. That on the 21st of November last, a survey and estimate of the expense of repairing the church were made and amounted to two hundred and four pounds; and at a vestry holden on the 25th of March last, such survey and estimate were laid before the parishioners assembled by the churchwardens, and a rate of one shilling in the pound proposed by them for the repairs of the church and other necessary and legal expenses for the year ensuing, which rate would not have raised a sum exceeding such estimate by more than ten or fifteen pounds, and that the parishioners were informed that the churchwardens, though satisfied that a rate of one shilling was necessary, were ready to accept any smaller rate which the vestry might be willing to grant, provided the same were not merely colourable and evasive; that, notwithstanding, the majority of the parishioners refused to make any rate, and that on all such occasions when they (the majority) refused to make a rate, the church was, and is now, in urgent need of repair, and that they did not at any time, when so assembled deny that the church was in need of repair, nor allege any reason for refusing to make a rate, save that such repairs ought to be effected by voluntary subscription, and that they were not by law bound to make a compulsory rate; and that it was probable that an alteration in the law of church rates would be shortly made. He cited the case of *Harrington and Stone v. Francklin*

and others, (a) in the Consistory in 1731, in which Dr. Henchman, the then chancellor, granted a similar monition.

SIR HERBERT JENNER.

There is quite sufficient stated in the affidavit to induce the Court to direct the monition to issue. The proceeding is new, but a very reasonable one. The time and place must be stated in the monition. (b)

(a) Dr. Haggard cited this case from a work published by Archdeacon Hale, entitled *Precedents in Causes of Office against Churchwardens and Others*, p. 67. London, 1841.

(b) The day stated was the 7th of May.

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PREROGATIVE COURT OF CANTERBURY.

SMITH *against* FELL.

On the admission of an Allegation.

This was a cause of proving the will of the Rev. George Gordon Smith, who died on the 16th of May, 1840, in the Queen's Bench Prison. The will was dated on the 12th of May, 1840, and was propounded by James Fell, the sole executor and universal legatee named in it, and an allegation was now offered on behalf of Charles Mackintosh Smith, a brother of the deceased, in opposition to the will, the admission of this allegation was opposed by *Nicholl* and *Harding*, and objections were

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Declarations made by a party in the cause to a solicitor whom the party had requested to act on his behalf, rejected as privileged communications.

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taken to various parts of the allegation, and amongst others to the 25th Article, which pleaded, “ That the death of the said deceased was communicated to his solicitor, Mr. Goren, on the day thereof in and by means of the letter hereunto annexed, marked No. 10, (a) written, addressed, and sent on that day to him, the said Mr. Goren, by the said James Fell; that pursuant to the wish therein expressed by the said James Fell, the said Mr. Goren immediately upon the receipt of the said letter, to wit, on the same day, proceeded to the Queen’s Bench Prison, and then and there had an interview with the said James Fell; that immediately upon seeing the said Mr. Goren on that occasion, the said James Fell, who was greatly elated, said, addressing Mr. Goren, ‘ Mr. Goren, I am extremely well satisfied with your exertions on Mr. Smith’s behalf, and now I wish you to continue to act for me,’ and upon the said Mr. Goren asking in a tone of surprise, ‘ How?’ or, ‘ In what respect?’ added, ‘ That Mr. Smith had made a will, of which he did not know the contents, only that he was the sole executor;’ and [further, ‘ that he] would take [or introduce] him to the gentleman who made it.’ That the said Mr. Goren *thereupon replied*, ‘ *Why, that, Mr. Fell, will require some consideration, and particularity as your present statement does not agree with your conduct in Mr. Smith’s lifetime;*’ that the said James Fell, without any more being said, [not dissenting, the said James Fell] then took him to the room of, and introduced him to a person named James Bowditch, then also a prisoner in the Queen’s Bench, a witness since produced and examined on

(a) The letter was annexed.

his, Fell's, part, and by whom the said pretended will is understood to have been drawn up and prepared. That on Mr. Goren begging to see the will, as he did immediately after their formal introduction to each other by the said James Fell, the said Mr. Bowditch exclaimed, 'Will! but are you friend or foe?' though after some little demur, he produced and handed to the said Mr. Goren what purported to be the draft of the will for his perusal. That the said Mr. Goren having read the same, and asked Mr. Bowditch from what or whose instructions the same had been drawn up, he, the said James Bowditch, replied, that the said James Fell had brought him the copy of a mortgage deed, and that from such and his, Fell's, verbal instructions, the said draft had been prepared, and that the said James Bowditch, in further answer to questions of Mr. Goren, admitted that the said pretended will had not been read over to or by the said deceased previous to its execution by him. That the said Mr. Goren was then proceeding to ask the said James Fell some questions as to the said pretended will, when the said James Bowditch all at once drew up and said, addressing the said James Fell, 'Don't answer any more questions, I see what Mr. Goren's at,' or they, the said Mr. Goren and Mr. Bowditch, and the said James Fell, respectively, then and there respectively, expressed themselves to that precise effect."

It was contended that this Article was inadmissible, that the communications and declarations to Mr. Goren, were made to him in his character as solicitor to Mr. Fell, that they were privileged communications, and could not be divulged; that the privilege

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was the privilege of the client, and not of the solicitor himself. *Greenhough v. Gaskell*, (a) *Doe d. Shellard v. Harris*. (b)

The *Queen's Advocate* and *Addams contra*, denied that Mr. Goren ever acted or intended to act as Mr. Fell's solicitor, that what was said by Fell, did not amount to a retainer of Mr. Goren as solicitor, and, therefore, that the communications were not privileged.

SIR HERBERT JENNER. (After reading the Article.)

These communications, in the way pleaded, must have been made under the apprehension that Mr. Goren consented to act as solicitor to Mr. Fell, and are, therefore, privileged communications. When Mr. Fell said to Mr. Goren, "I wish you to act for me," he must have meant that he should act as his solicitor, and Mr. Goren then, "not dissenting," is introduced to Mr. Bowditch, when the communications and declarations are pleaded to have taken place, and surely such communications would not have taken place but under the idea that Mr. Goren had accepted the offer made to him to act as Mr. Fell's solicitor; it appears to me that these are of the nature of privileged communications. I am of opinion that this Article of the allegation is inadmissible, and I reject it.

The allegation having been referred back for reformation as to other objections which were taken,

(a) 1 Mylne & Keen, 98.

(b) 5 Car. & P. 593.

the above Article was also altered by striking out the words between the brackets in the 24th, 25th, 30th, and 31st lines, and inserting the words in italics, and the allegation came on again for admission as reformed on the 19th of June, but the Court having rejected the Article at the former hearing, would not again enter into the question of its admissibility.

From the rejection of the Article, an appeal was prosecuted to the Privy Council, and the Judicial Committee affirmed the decision of the Prerogative Court; they stated that they would not have precluded the party from amending the Article, but they held that the Article, even as amended, was inadmissible.

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 GODRICH *against* JONES.

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Mr. Lane, the solicitor who prepared the will in question, having been re-examined, (a) the cause now came on for hearing. This witness having stated in his first examination that he had made certain entries in his books with reference to the drawing of the will, he was required by an interrogatory, to produce to the examiner and to let the examiner copy the extracts, to leave fac-simile copies thereof, and to be asked if the copies were correct, and if the originals were in the same state as when first written. This interrogatory had been answered by the witness, and the examiner had collated the copies with the originals.

A witness (the solicitor who drew the will propounded) having in his deposition referred to certain entries in his books with reference to the drawing of the will, and having, as required by an interrogatory, given copies of those entries, and allowed the examiner to collate them with the originals. Motion to compel the witness to produce the books themselves, rejected.

(a) *Vide ante*, p. 630.

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The *Queen's Advocate* and *Haggard* now moved the Court to direct Mr. Lane to produce the books themselves. The witness admits that he was sent for by Mr. Godrich to draw the deceased's will, that he had no previous acquaintance with the deceased, and he states that he made minute entries in his books of certain interviews he had with Mr. Godrich and the deceased, *recenti facto*, and, in his evidence, he speaks, not from recollection only, but from what he put in writing at the time. The witness having been re-examined after he had seen the evidence of the other witnesses in the cause, the fullest means should be afforded of testing his credibility. The entries being made at the time, may be considered as the instructions for the will, there being no other instructions.

The witness being produced by Mr. Godrich, his client, the production of the books cannot be resisted on the ground of privilege; all privilege has been waived.

Addams and Robinson, contrâ.

SIR HEBERT JENNER.

This is quite a novel application. I never remember to have heard it contended, that because a witness in his deposition has referred to certain entries in his books in relation to the transaction of which he speaks, and to which he may refer to refresh his memory, that he is bound to produce the books themselves. No authority has been adduced to shew that under such circumstances a solicitor may be required to produce his books, that an adverse party may see what they contain, not

only with reference to the transaction in question, but to any other matters. It would have been a different case if the extracts had been pleaded by the party propounding the will. No precedent or principle, nor anything in the nature of authority has been given in support of the application. Can every witness, solicitor, or not, where fraud is suggested, be compelled to produce all his books in order that they may be inspected?

I am of opinion that Mr. Lane has answered the interrogatory sufficiently and properly, and that I cannot compel him to produce his books, or give any further extracts.

The cause was afterwards argued upon the evidence at great length, and the Court being of opinion that the will was sufficiently proved, pronounced for its force and validity.

on appeal from this sentence to the J. C. of the P. C. (Jan'y 18. 1845) It was confirmed so far as the Will & 1st codicil. but was having transpired in consequence of proceedings in Chancery relating to the 2^d Codicil that was pronounced against. —

ARCHES COURT OF CANTERBURY.

ELLIS and GOUGH against GRIFFIN.

This was a cause of subtraction of church rate, brought by the churchwardens of Portsea against Wm. Griffin, a parishioner. The amount sued for was seven shillings and sixpence.

The cause commenced in July, 1835, in virtue

debts incurred in the previous year by reason of the parishioners having refused a rate, pronounced against with costs.

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A church rate
to raise 400l.,
a part of which,
amounting to
250l., was in-
tended to pay

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of letters of request from the Chancellor of the diocese of Winchester. The libel pleaded in the usual way, the making of the rate (of threepence in the pound) on the 29th of October, 1834 ; that the party had been summoned for payment, and that he objected to the validity of the rate, &c.

An allegation was admitted on the part of the defendant, pleading, that the sum to be raised by the rate in question, 400*l.*, was not needed for the repairs of the church for the current year ; that the sum necessary for the current year was about 148*l.*, and that the remainder was intended to pay debts which had been previously incurred, of about 252*l.*

In reply to this, on the part of the churchwardens, an allegation was offered, pleading, that they entered upon their office in April, 1833, that they summoned a vestry on the 17th of October in that year, at which a rate was proposed to sustain the fabric of the church and for the performance of Divine worship ; that an amendment was moved and carried, “ that it is the opinion of this vestry, the rate proposed is unjust and oppressive on the inhabitants at large, and that, therefore, that this meeting do adjourn to take the subject under its consideration on the first Wednesday in October, 1834 ; ” that the churchwardens, being thus left without funds, incurred debts during that year to the amount of 250*l.* That on the 29th of October, 1834, the same churchwardens, who had been re-elected for another year, called another vestry, when they stated that they had been obliged to incur debts and liabilities owing to the refusal of the rate in 1833, which they proposed to pay out of the rate, and although an amendment was moved to adjourn the consideration of a rate for another

twelvemonth, a rate of threepence in the pound was carried by poll.

This allegation was opposed ; it was contended that the allegation was not an answer to the plea set up by the defendant ; that, in point of law, it amounted to an admission of the invalidity of the rate ; that the rate was made principally for the purpose of reimbursing the churchwardens expenses and debts incurred by them in a previous year. The Court, however, admitted the allegation, observing that there was not in the case such a state of admitted facts as would enable the Court to dispose of the case in its then shape ; that in order satisfactorily to decide the questions raised, it would be necessary to see what the proofs in the case would be.

The Court having admitted this allegation, a prohibition was applied for to the Court of Queen's Bench. A rule *nisi* having been obtained, the cause was suspended in this Court ; the party was afterwards directed to declare in prohibition, which declaration being demurred to, the case was argued at the Sittings after Trinity Term, 1839, (*a*) when the Court sustained the demurrer on the ground that if the judgment of the Court of Arches was erroneous, it was not a matter for prohibition but of appeal, the suit itself being of ecclesiastical cognizance. The cause then proceeded in this Court, and evidence having been taken upon the pleas, now came on for hearing.

Addams, in support of the rate. The factum of the rate is not denied, and the objection now is,

(*a*) 11 Add. & Ell. 743.

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that the rate is retrospective. The doctrine as to retrospective rates has been much misunderstood. *Lanchester v. Thompson*, (a) and the other cases similar to it, have no application ; those were attempts to compel the making of rates to reimburse ; here the churchwardens asked for a rate in 1833, and the question is adjourned by the vestry until the next year, and in the meantime the churchwardens incur certain necessary expenses, and in the next year, after laying before the vestry a statement of the debts and responsibilities they had incurred, obtained the present rate of threepence in the pound by a majority of the parishioners. This is not such a retrospective rate as renders it incumbent on this Court to refuse to enforce it. In *Farlar v. Chesterton*, (b) the illegality of the rate was founded upon its having been made for the purpose of liquidating large outstanding demands, incurred in several previous years ; here the rate was made not to pay off debts incurred in former years. From the judgment of the Court of Queen's Bench in this case, which allowed the demurrer, it is clear that that Court did not consider the rate retrospective, or it would have granted a prohibiton ; the inference is, that the Court considered the retrospective purpose of this rate justified under the circumstances.

Parishioners assemble in vestry to do what is obligatory upon them by the common law, and not to shift off obligations and evade the law. Parishioners are not to take advantage of their own wrong.

Nicholl and Harding, contra.

(a) 5 Madd. 4.

(b) *Chesterton v. Farlar*, vol. 1, pp. 345. 367. 371 ; and *Farlar v. Chesterton*, 2 Moore, P. C. Cases, 330.

JUDGMENT.

SIR HERBERT JENNER.

In this case, the question is now confined to this point, whether the circumstances are such as to distinguish it from *Farlar v. Chesterton*, for if the cases are not to be distinguished, this Court is bound by the decision in that case, to pronounce against the validity of the rate.

In the case of *Farlar v. Chesterton*, the vestry of the parish of Kensington, with a full knowledge of the facts, granted a church rate to liquidate debts incurred in former years. In this case a vestry was called by the churchwardens in the parish of Portsea, in October, 1833, to make a rate for the necessary repairs of the church, and expenses incidental to the office of churchwarden, when an amendment was moved and carried, that the question be adjourned till the first Wednesday in October, 1834. The churchwardens, on this refusal, for in law it was a refusal, proceeded by their own authority, and that of the minority in vestry, to make a rate, but were advised that they could not sue for it, and it was, consequently, abandoned. No proceedings were adopted to call another vestry till the 29th of October, 1834, the same persons being still the churchwardens. I see no distinction between the cases where the same individuals are in office a second year, and where they are different individuals, it is as churchwardens that they sue, and as churchwardens their year of office expired in Easter week ; if re-elected, they are the same as new churchwardens, and they are to make their declarations as new churchwardens. These churchwardens, in 1833, called no vestry until October, and it is said that they were guilty of *laches* in that

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respect, but I cannot assume that there was any *laches* on their part in the execution of their duty, for it is impossible to say that they must not have had time to consider what repairs or expenses were necessary, and to be prepared with estimates to lay before the vestry. It appears that in 1833, up to the period of the termination of the ecclesiastical year, if I may so term it, in 1834, the churchwardens had incurred debts, and at the vestry in October, 1834, a rate was made for 400*l.*, including 250*l.* for expenses incurred in the previous year, (of which a statement was laid before the vestry), in consequence of the refusal of the vestry to make a rate. Now I cannot say that there is such a distinction between this case and that of *Farlar v. Chesterton* as to authorize me to hold this to be a rate which can be supported without a well-grounded apprehension that if I were to pronounce in favor of its validity, my judgment would be reversed by the judicial committee. With every desire to give proper support to the churchwardens, who were placed in a situation of great hardship and difficulty by the refusal of the rate 1833, I feel that the case of *Farlar v. Chesterton* is a decision which must govern this Court, unless there are circumstances of distinction, which, it appears to me, do not exist in this case. I must, therefore, pronounce against the rate, and dismiss the party.

The Court has been prayed to condemn the churchwardens in the costs. Now where churchwardens sue upon a valid rate, it is a rule, that they should have their costs, and I fear that where they fail, as in this case, the Court is bound to condemn them in costs. I feel the hardship of the case, but I think I am bound by the rules and practice of the Court to condemn them in costs.

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March 3rd.
May 7th.

CONSISTORY COURT OF LONDON.

MORGAN *against* MORGAN.

1840.

June 12th.

This was a suit of divorce by reason of the adultery of the wife. Mr. Herbert Morgan, the husband, a minor (born 17th of May, 1820), was a cornet in the 15th Hussars, stationed at Bangalore in the East Indies. On the second session of Trinity Term (1840), the *Queen's Advocate* prayed the Court to appoint the father of the husband his guardian, for the purpose of carrying on the suit on his behalf; he submitted that unless the Court were to do so, great injury might be sustained by the husband as the evidence of adultery might be lost; the case was similar in principle to that of a lunatic, where the Court allowed proceedings to be carried on by the committee. (a) This case is not like that of *Beauraine v. Beauraine*, (b) as the father here is desirous of acting on behalf of his son. The father has already been permitted to proceed for his son in the Court of Exchequer.

A father appointed curator *ad litem* to his son, a minor, resident in the East Indies, for the purpose of proceeding against his wife for divorce by reason of adultery. The sanction of the son to be afterwards obtained.

DR. LUSHINGTON.

I am disposed to grant this application. I shall allow the proceedings to go on, and witnesses to be examined, but before making any decree I shall expect to have the sanction of the son.

(a) *Parnell v. Parnell*, 2 Cons. Rep. 169.

(b) 1 Cons. Rep. 498.

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The case is not like that of *Beauraine*, nor have I been able to find a similar case.

A citation was then taken out and the libel was afterwards brought in, which was not opposed; it pleaded that the marriage took place at Isleworth, on the 24th of April, 1837, that the husband was at the time sixteen and under seventeen years of age; that the wife was twenty-one and upwards; that the husband was at school at Ealing, and that the wife's mother kept the post-office there; that immediately on the discovery of the marriage, the husband was removed from school by his father, and in June, 1837, was sent to the Continent, where he remained till October, 1839, when he obtained a commission in the 15th Hussars, and proceeded to India; that by reason of the premises there had been no cohabitation between the parties as husband and wife, and only stolen interviews; that previous to the autumn of 1839, Mrs. Morgan resided with her mother at Ealing, since which time she had carried on an adulterous intercourse with a person named Alexander Thorn, and that in 1840, she was delivered of a child.

Witnesses were examined in support of the libel, and the cause now came on for hearing.

The husband executed a proxy in India appointing his father guardian, &c. (a)

(a) The proxy was as follows:—

“Whereas a marriage was had and celebrated, to wit, on or about the 24th day of April, 1837, in the parish church of, &c. between me the undersigned Herbert Morgan and Elizabeth Morgan then Lawford, spinster: And whereas since the said marriage, the said Elizabeth Morgan hath committed the crime of adultery, by reason whereof, I the said Herbert Morgan am desirous of procuring a divorce from bed, board, and mutual cohabitation with her: And

Haggard, for the wife. I shall contend that there is no evidence in the suit. The objection

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whereas I the said H. M. am now a minor, to wit, of the age of twenty years but under the age of twenty-one years, and therefore, by law incapable of acting in my own name, and I am desirous of appointing a curator or guardian for suits, but more especially for the purpose of instituting and carrying on such causes and suits as may be necessary and proper, in order to procure me, the said minor, to be legally divorced from my said wife: And whereas certain proceedings have been already had and taken on my behalf by Henry Mannington Morgan, my natural and lawful father for the purpose of procuring the said divorce.

"Now know all men by these presents, that I the said Herbert Morgan, now at Bangalore in the East Indies, a cornet in H. M. 15th regiment of Hussars, for divers good causes and considerations me thereunto especially moving, have elected and chosen, and do hereby elect and choose the aforesaid H. M. Morgan, of, &c., my natural and lawful father, to be my curator and guardian for suits, but more especially for the purpose of citing my wife, the said E. M. to answer to me acting by my said guardian in a certain cause of divorce or separation from bed, board, and mutual cohabitation, by reason of adultery committed by the said E. M. and of carrying on the said cause or business for me and on my behalf; and in case of the death of my said father or of his refusal or declining to act, I do hereby elect and choose Jonathan Morgan, of the city of Bath, Esq., my grandfather, to be my curator or guardian for the purposes aforesaid: And to the end that this my special proxy may have its due effect in law, I do hereby nominate, constitute, and appoint F. S. and J. H. P. notaries public and two of the procurators-general of the Arches Court of Canterbury, or in their absence any other proctor, &c. for me, &c., to appear before the Right Honorable Stephen Lushington, Doctor of Laws, Vicar-General of the Right Reverend Father in God, Charles James, by Divine Permission, Lord Bishop of London, and Official Principal of the Consistorial and Episcopal Court of London, his surrogate, or any other competent judge of the said Court, or of any other court or courts whatsoever; and to exhibit this my proxy, and pray and procure the same and the election and choice herein contained to be admitted and enacted, and the said H. M. Morgan or the said J. Morgan to be assigned my curator or guardian to the intent and for the purposes aforesaid: And generally to do, perform, and execute all such acts, matters, and things as shall or may be requisite and necessary to be done for me and in my name, in and about the premises: And I do hereby promise to ratify and confirm

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arises upon the proxies that have been exhibited. The suit originated upon an affidavit that the husband was a minor, upon which a guardian was appointed for the purpose of proceeding. I am not aware of any case where the Court has appointed a guardian to a minor, not an infant; the appointment in this case I understood was made subject to confirmation by the party, in all such cases there has been an election. In *Barham v. Barham*, (b) there was an election, and here the party is competent to elect. In *Beauraine v. Beauraine*, (c) the son elected his father as guardian. Here the husband may be cohabiting with the wife.

DR. LUSHINGTON.

Can that be so? The Court granted the application upon being informed that the wife was resident here and the husband in India.

Haggard. That was the case then, but the parties might be cohabiting now; the minor may be doing something in opposition to the father; he may have condoned the adultery.

Then are the instruments before the Court sufficient for the purpose? First, there is a proxy of election, dated the 1st of September, 1840, signed by Herbert Morgan the son. And there is the acceptance by the father, dated on the 18th of November, 1840; at that time all the important witnesses had been examined. What does the instru-

all and whatsoever my said proctors or proctor shall lawfully do or cause to be done therein." In witness, &c.

(b) 1 Cons. Rep. 5.

(c) 1 Cons. Rep. 498.

ment from the son authorize the father to do? it is entirely prospective, for the purpose of *instituting* proceedings—of *citing* the wife, &c., and carrying on the said cause. There is nothing of recognition of the present proceedings—nothing retrospective, no ratification of the proceedings then taken by the father.

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Pratt, on the same side. This is a special proxy, which according to all authorities is limited to the precise purpose for which it was granted.

The *Queen's Advocate* and *Addams*, *contra*.

DR. LUSHINGTON.

I see no reason to repent the course I pursued in the commencement of the proceedings. On the facts stated in the affidavit of the father, that the son was a minor and resident in the East Indies, the father residing in England, and that the wife had committed adultery, I apprehend that it was the duty of the Court to interfere to prevent a failure of justice; had the Court declined to interfere, the whole of the evidence (assuming the charge to be well founded) might have been lost before the husband could have duly authorized the commencement of proceedings. My impression was, that justice required me to do what I did, and what I meant to do was to prevent the party from being prejudiced by his absence, and from being concluded by any acts done by his father during his absence, and I expressly stated that before giving my final judgment, I should require a confirmation by the son of the proceedings taken by the father.

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Query, whether
the proxy
sufficient.

These proceedings may be divided into two parts ; first, the institution of the suit and the proceedings carried on by the father without the knowledge of the son ; and secondly, the proceedings had in virtue of the proxy executed by the son. With regard to the former, it is said, that they acquire confirmation and approval by the son ; the latter, it is admitted, do not require any further confirmation.

The objection, in regard to the first, is that it is not what was required by the Court, that it is not a confirmation of the proceedings ; the proxy undoubtedly is not retrospective, but it is executed with the view of the father's obtaining a divorce for the son, by reason of his wife's adultery, and in my opinion, it indirectly confirms everything previously done. The proxy in strictness ought to have set forth the institution of the suit by the father, stating what the Court had directed, and it should have gone on to confirm all that had been done and should be done by the father under the direction of the Court. But the question is, whether the proxy is not sufficient evidence of the consent on the part of the son to the proceedings which have been taken, so as to authorize the Court to proceed to sentence ? In *Fraser v. Fraser*, (a) the brother of the party instituted the suit as his agent under a power of attorney, but Lord Stowell declared that he would not sign the sentence unless the proceedings were confirmed by the brother himself. The point comes to this, whether the proxy is sufficient or not to justify the Court in signing a sentence of separation ? if not, still I ought to proceed to hear the

(a) Not reported.

cause, because if I am of opinion that the husband is entitled to a separation, I might delay signing the sentence until a proxy should be received from the son confirming all that had taken place. I need not, therefore, decide as to this objection now, but may proceed with the hearing of the cause.

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Haggard then contended that there was not sufficient proof of the identity of the wife, and objected to the evidence of one of the witnesses who had been re-examined upon an article upon which he had been previously repeated.

DR. LUSHINGTON.

If the witness had been examined to make up any further proof upon the Article, I might have had some doubt as to receiving the evidence, but here the witness is reproduced for the purpose only of proving identity. At his examination the witness might not be able to identify the party, but upon seeing the party afterwards, he might be able to do so ; it is not like a witness setting about afterwards to refresh his memory in order to make up the proof, there the Court would not admit the evidence. I shall overrule the objection ; but I wish to put it to the counsel for the husband, whether the Court ought in this case to pronounce a divorce in favour of the husband, assuming that the marriage took place in April, 1837 ; that the husband was seventeen years of age, and the wife eighteen or nineteen ; that there was a cohabitation for only a few days, when the wife was abandoned ; it not being pleaded that she had any maintenance, and the adultery being committed in the autumn

Objection to the evidence of a witness, who after his examination, was reproduced to prove the identity of the wife, not sustained.

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of 1839, two years after the marriage, and no action for damages being pleaded.

The Queen's Advocate and Addams.

The husband in this case had no means ; he was a minor at the time, and was sent abroad by his father ; he is still a minor, and is unable to support his wife, having nothing but a cornetcy in the Hussars. But suppose there had been a wilful desertion of the wife, that is no bar to a divorce.

. *Reeves v. Reeves, (a) Sullivan v. Sullivan. (b)*

The Court took time to deliberate.

JUDGMENT.

DR. LUSHINGTON.

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Divorce by reason of adultery committed by the wife, is not barred by a previous wilful desertion of the wife by the husband.

In this case some preliminary objections were taken which it will be convenient first to dispose of. The first is, whether the suit has been so commenced and conducted as to justify the Court to determine at all as to its merits? The suit was commenced by the father of the husband, a minor, in India, who was permitted by the Court to carry on the suit on his behalf. I am of opinion that I was authorized to take this step both on precedent and on principle, to prevent a failure of justice. With regard to proceedings here, a father as guardian, and a committee in cases of lunacy, is in a case of minority permitted, although he cannot be compelled to institute proceedings. In *Fraser v. Fraser*, a brother, upon a mere power of attorney, was allowed to institute a suit, the Court being anxious to prevent an injury being suffered by

(a) 2 Phill. 125.

(b) 2 Add. 299.

parties unable to protect their own interests from absence. If there were no means of proceeding immediately in such cases evidence might be lost, and parties might be deprived of remedy. No real injury can result to the party proceeded against, for the same means of defence are open to her, and of cross-examining witnesses, and of pleading and producing witnesses, and if the answers of the other party were required, the Court has the power, and, if necessary, would exercise it, of suspending the hearing of the cause until those answers were brought in.

In this case, as in *Fraser v. Fraser*, the Court required a proxy from the husband in order to be satisfied that he sanctioned the proceedings. At first I had some doubt as to the form of the proxy, whether it ought not merely to authorize the suit to be instituted and carried on, but also to confirm all previous proceedings, and I was the more impressed with this notion from the case of *Dennis v. Dennis*, (a) which was a suit in the Arches Court by the husband against his wife for nullity of marriage brought by his guardian *ad litem* during his minority. The husband before the hearing came of age, and on an objection being taken that there was no proxy from the husband, the Court directed the cause to stand over, in order that he might give a proxy, and that being done, the Court signed the sentence, pronouncing the marriage null and void. And I find in my note of the case this observation, as falling from the Court, "If the suit had been by a testamentary guardian, *quære* if any proxy at

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(a) *Dennis v. Dennis*, Arches, 1815, not reported.

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all necessary." In that case the whole of the proceedings had been brought to a conclusion before any proxy was required or produced. In the present case the suit was commenced and then came the proxy, when witnesses were examined, and the case goes on. Now, he who authorizes a suit to be carried on to a conclusion, must have intended to authorize the proceedings then had. In *Fraser v. Fraser*, the proxy ultimately executed was not confirmatory of all that had taken place, but simply to carry on proceedings. I am of opinion then, that there is no legal impediment to considering the merits of the case. The next objection is, that there is no proof of the identity of the wife. In all these cases the identity must be proved; with respect, first, to the marriage; secondly, to the sexual intercourse; and thirdly, as to the party in the suit. In this case the proof is perfectly satisfactory, it is so free from doubt that it would be useless to state the evidence in detail.

To come then to the merits: I will first observe that the adultery is admitted—indeed it is incontestably proved. Then is the conduct of the husband such as to bar him of his remedy? The marriage took place on the 24th of April, 1837, Mr. Herbert Morgan being at the time not quite seventeen, and Elizabeth Lawford of the age of eighteen or nineteen, there was therefore no great disparity in their ages, although there was as to their relative stations in life. Mr. Morgan, who was at school, had considerable expectations from his father and grandfather. Elizabeth Lawford lived with her mother, who kept the post-office at Ealing. There is no

evidence that the mother in any way endeavoured by advice or assistance, to procure the marriage, nor is there any evidence of any misconduct on the part of the wife previous to the marriage, or of any deviation from the paths of virtue, till the autumn of the year 1839, two years and a half after the solemnization of the marriage. The marriage was clandestine, and therefore in fraud of the father's rights; but nevertheless in point of law it was a legal marriage; it was obligatory on both parties to fulfil their vows; he was bound by his solemn declarations, "to love her, comfort her, honour and keep her in sickness and in health, and to keep only to her as long as they both should live." That was the obligation the law fixed upon the husband, although a minor; let us see how he has performed it.

In a very few days after the marriage, the husband, no doubt by parental authority, was sent to the Continent, and subsequently to India, where he now is. That the smallest consideration was paid to the wife, either for her protection or for her maintenance, there is no evidence whatever. She, a girl of nineteen, of great personal beauty (as stated by all the witnesses), recently married, is at once left—I will not say to the risk, but almost to the certainty of destruction.

To the wife, this marriage, followed up by a divorce, leaving her without any claim for maintenance, has proved utter ruin. I do not extenuate her guilt, but I cannot forget the situation of a young married woman thus suddenly separated from her husband. To the husband, the consequences have been some expense, some trouble, exile from home during the period he has been in India (where

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the wife has had no means of watching his conduct), and a judgment in this Court, by which, if it decrees a divorce, he will be absolved from all legal obligation of maintaining his wife, and, it may be, an act of the Legislature dissolving the marriage. That such an example can be otherwise than prejudicial to public morals, cannot for a moment be stated, but it is only justice to Mr. Morgan to say, that he, being a minor, dependent on his family, it would be going too far to impute to him a wilful abandonment of his wife. Then does such conduct bar the husband of a divorce? and is the violation of the marriage obligation on the part of the wife to be followed by no penal consequences?

The first inquiry is, whether such a case is to be decided upon principle, or by the authority of precedents. During the absence of a husband, by the law of England, the wife has no direct remedy, she may pledge his credit for necessaries, but she cannot resort to a Court for a direct remedy; but although left destitute of aid, it does not follow that she has a license to commit adultery. In some cases very strong observations have fallen from the Court as to the duty of a wife in cases of separation. I have a note of what fell from Lord Stowell in the case of *Dennis v. Dennis*, (a) but all such observations ought to be taken with reference to the particular circumstances of the case. I have not been able to find a single instance of an actual decision upon the point; two cases were cited in the argument, *Reeves v. Reeves*, (b) and *Sullivan*

(a) Consistory, 1808, not reported, referred to 1 Cons. Rep. 446, and 3 Hagg. E. R. 348, 353.

(b) 2 Phill. 125.

v. *Sullivan*, (a) but in those cases the learned judge, declared that there was no wilful and deliberate desertion, so that the point was not actually decided. But I find, from my own notes, that on the admission of the allegation in *Reeves v. Reeves*, Sir John Nicholl expressly declared that a wilful desertion of a wife was no bar to a suit against her for adultery; and in *Sullivan v. Sullivan*, (b) the doctrine is repeated; he says, "I am still to learn that even a malicious desertion of the wife by the husband, is any bar to a sentence of divorce prayed by the husband for adultery committed by the wife." Here then the authority of Sir John Nicholl is repeated in these two cases, and although they are not to be considered precisely as decisions upon the point, yet they are authorities of the highest weight, not only as coming from a judge of a Superior Court, but from a judge of the greatest learning and experience. The present case cannot be carried beyond wilful desertion, and I am bound to administer the law as I find it, and I cannot say that it is not founded on just grounds, although in particular cases great hardship may fall on the individuals. I pronounce for the divorce.

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(a) 2 Add. 299.

(b) 2 Add. 302.

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The Office of the Judge promoted by
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A child baptized with water and in the name of the Trinity, by a person having no authority to administer the rite of baptism, although irregularly baptized, is not unbaptized according to the meaning of the rubric prefixed to the order for the burial of the dead in the Book of Common Prayer. A clergyman refusing to perform the office for the interment of the dead over the body of a parishioner so baptized, due notice of the death having been given him, suspended for three months.

This was a proceeding instituted by Mr. Frederick George Mastin of Gedney in Lincolnshire, against the Reverend Thomas Sweet Escott, the vicar of that parish, "for refusing to bury the corpse of Elizabeth Ann Cliff, the infant daughter of Thomas and Sarah Cliff, of the parish of Gedney, convenient warning having been given him thereof." The proceedings commenced in this Court by virtue of letters of request from the Chancellor of the diocese of Lincoln.

The Articles, which were admitted without opposition, were in substance as follows:

The 1st, 2d, and 3d Articles pleaded the incumbency of Mr. Escott, and his obligation as a priest or minister of the Church of England to observe the laws, canons, and constitutions ecclesiastical of this realm.

4th, That by the 68th canon, entitled "Ministers not to refuse to christen or bury," it is decreed, ordained and contained as follows:—"No minister shall refuse or delay to christen any child according to the form of the Book of Common Prayer, that is brought to the church to him upon Sundays or

holydays to be christened, or to bury any corpse that is brought to the church or churchyard, convenient warning being given him thereof before, in such manner and form as is prescribed in the said Book of Common Prayer; and if he shall refuse to christen the one, or bury the other (except the party deceased were denounced excommunicated *majori excommunicatione* for some grievous and notorious crime, and no man able to testify of his repentance,) he shall be suspended by the bishop of the diocese from his ministry by the space of three months."

5th. That notwithstanding the premises, and in contempt of the law and canon aforesaid, Mr. Escott did, on two several occasions, happening respectively on the 16th and 17th of December, 1839, expressly declare his determination not to bury in the churchyard of Gedney aforesaid the corpse of Elizabeth Ann Cliff, the infant daughter of Thomas Cliff and Sarah Cliff his wife, of the parish of Gedney aforesaid, if brought for burial to the said church or churchyard: and that accordingly, and in pursuance of such declared determination, the said T. S. Escott, on the 17th day of the said month of December, or on some other day in the said month, did, contrary to his duty, refuse to bury in the churchyard of Gedney aforesaid the corpse of the said Elizabeth Ann Cliff, then brought to the said church or churchyard, convenient warning having been given him thereof.

6th. That the said Elizabeth Ann Cliff, the infant aforesaid, died within the parish of Gedney, and that such infant, being the daughter of Thomas Cliff and Sarah Cliff his wife, who are Protestants

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of the class of people commonly called or known as Wesleyan Methodists, and who were in the months of August, September, October, November, and December, 1839, and had been for some time previous thereto, in the habit of frequenting or resorting to a chapel or place of religious worship established by, or for the use of, a congregation of the said class of people, situate within the said parish of Gedney, had been first, to wit, on or about the 1st day of October, 1839, baptized according to the rite or form of baptism generally received and observed among the said class of people commonly called or known as Wesleyan Methodists, that is to say, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend Elisha Balley, a minister, preacher, or teacher of the said class of people. That of the aforesaid fact of baptism the said Thomas Sweet Escott was informed, as well on the 16th day of the said month of December, 1839, by the said Thomas Cliff, as on the morning of the said 17th day of the said month, by the Reverend Robert Bond, also a minister of the said class of people commonly called or known as Wesleyan Methodists, when they respectively urged and intreated him, on such two several occasions, to consent to bury the corpse of the said infant; and that by means of such information, as well as by other means, the said Thomas Sweet Escott was, previous to, and at the time of his refusal to bury the said corpse, well and sufficiently apprised and aware of such fact of baptism; and that on each of the two several occasions aforesaid, as also subsequently on the said 17th day of December, when the corpse of the said infant having been

brought to the churchyard of the said parish, application was made to him for the burial thereof in the said churchyard, in the manner and form prescribed by the Book of Common Prayer, he did make or assign the aforesaid fact of baptism expressly as the pretext or ground of refusing to comply with such entreaties and application.

7th. That Mr. Escott, for such the offence in the preceding Articles set forth, ought to be canonically corrected and punished.

8th, 9th, and 10th, the usual formal Articles.

The whole of the Articles, with the exception of the 5th, 6th, and 7th, were admitted to be true: and for the proof of those Articles witnesses were produced and examined on the part of Mr. Mastin.

A defensive Allegation, on the part of Mr. Escott, was afterwards admitted, pleading:—

First, that in forming his determination not to bury the corpse of Elizabeth Ann Cliff, and in refusing to read the burial service at its interment, he did not act in contempt of the laws, canons, and constitutions ecclesiastical of the Church of England; but that, on the contrary, he acted in obedience to, and in conformity with, the obligations by which he bound himself when he became an ordained minister of the Church of England.

Second, that in the preface to the *Form and Manner of Making Deacons*, as established by the Liturgy of the Church of England, it is expressly set forth and provided, “that none shall be accounted or taken to be a lawful bishop, priest, or deacon, in the United Church of England or Ireland, or sufficient to execute any of the said functions, except he be called, tried, examined and

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admitted thereto according to the form hereafter following, or hath had formerly episcopal consecration or ordination."

Third, that whereas it is pleaded in the Sixth Article that the deceased had been baptized by a minister, preacher, or teacher of the class called Wesleyan Methodists; such minister was unordained; and that any rite or form of baptism performed by him is to all intents and purposes null and void, in the sense of, and according to, the articles, canons, and rubric of the Church of England.

Fourth, that from and after the conferences holden at Hampton Court, in 1603, the practice of the Church of Rome, which had hitherto permitted the rite of baptism to be performed by laymen and midwives, under license from the bishops of their respective dioceses, and which practice had up to that period been tolerated by the reformed Church of England, was repudiated by the ecclesiastical authorities of this realm assembled at the said conferences; and in order to give effect to such repudiation, King James I. directed an alteration to be made accordingly in the Liturgy of the Church of England, and from that period the Liturgy has not allowed the rite of baptism performed by unordained persons to be valid, but has held the direct contrary.

Fifth, that in the Liturgy, "imprinted by the deputies of Christopher Barber, printer to the Queen's most excellent Majesty, A.D. 1595," in the part entitled, "Of them that be Baptized in Private Houses," the rubric directs as follows:—"First, let them that be present call upon God for

his grace, and say the Lord's Prayer, if the time will suffer, and then one of them shall name the child, and dip him in water, or pour water upon him, saying these words,—‘I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.’ ”

Sixth, that the Liturgy of the Church of England, entitled, “The Book of Common Prayer, with the Psalter or Psalms of David, of that Translation which is Appointed to be Used in Churches, imprinted at London by Robert Barber, printer to the King's most excellent Majesty, 1606, *cum privilegio*,” in the part entitled, “Of them that are to be baptized in private houses in the time of necessity by the minister of the parish, or any other lawful minister that can be procured,” the rubric enjoins as follows:—“First, let the lawful minister and them that be present call upon God for His grace, and say the Lord's Prayer, if the time will suffer, and then the child being named by some one that is present, the said lawful minister shall dip it in water, or pour water upon it, saying these words,—‘I baptize thee in the name of the Father, and of the Son, and the Holy Ghost.’ ”

Seventh, that in the rubric of the Book of Common Prayer, which is a part and parcel of the statute 13 & 14 Car. 2, c. 4, in the order for burial of the dead, it is enjoined that such office is not to be used for any that die unbaptized, or excommunicate, or have laid violent hands upon themselves.

Eighth, that the 68th canon of 1603, referred to in the fourth of the Articles, can only be taken and

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construed in conjunction with, and in reference to, the other canons promulgated in the same code : and that by the 9th canon it is decreed that “ who-soever shall hereafter separate themselves from the communion of Saints as it is approved by the Apostles’ rules, in the Church of England, and combine themselves together in a new brotherhood, accounting the Christians who are conformable to the doctrine, government, rites, and ceremonies of the Church of England, to be profane and unmeet for them to join with in Christian profession, let them be excommunicated *ipso facto*, and not restored but by the archbishop after their repentance and public revocation of such their wicked errors ;” —and by the 12th canon, it is decreed, that “ who-soever shall hereafter affirm that it is lawful for any sort of ministers and lay persons, or either of them, to join together and make rules, orders, or constitutions, in causes ecclesiastical, without the King’s authority, and shall submit themselves to be ruled and governed by them, let them be excommunicated *ipso facto*, and not be restored until they repent and publicly revoke those their wicked and anabaptistical errors ;” —by the 5th canon it is decreed, that “ whosoever shall hereafter affirm that any of the Thirty-nine Articles, agreed upon by the archbishops and bishops of both provinces, and the whole clergy, in convocation holden at London in 1562, for avoiding diversities of opinions, and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as may not with a good conscience be subscribed unto, let him be excommunicated *ipso facto*, and not restored, but only by

the archbishop, after his repentance and public revocation of such his wicked errors."

Ninth, that by the 23rd of the Thirty-nine Articles it is decreed, that "it is not lawful for any man to take upon him the office of public preaching or ministering the Sacraments in the congregation, before he be lawfully called and sent to execute the same; and those we ought to judge lawfully called and sent which be chosen and called to this work by men who have public authority given unto them in the congregation to call and send ministers into the Lord's vineyard."

Tenth, that by the 25th of the Thirty-nine Articles it is decreed, that "there are two Sacraments ordained of Christ our Lord in the Gospel, that is to say, Baptism and the Supper of the Lord;"—that Elisha Balley never was, and is not, a lawful minister, and never hath received episcopal ordination or consecration, and that by reason of the premises, Elizabeth Ann Cliff was not in fact baptized by him; but the said pretended baptism, if performed as alleged, was altogether invalid, and contrary to, and in contempt of, the doctrine and discipline of the Church of England, and of the laws, canons, constitutions, and rubrics hereinbefore set forth.

The *Eleventh* Article was rejected.

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The proctor for Mr. Mastin having "admitted that Elisha Balley, mentioned in the tenth Article of the Allegation, never had received episcopal ordination or consecration, and was and is not a

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The *Queen's Advocate*, *Haggard*, and *Nicholl* for Mr. Mastin.

Phillimore and *Harding*, *contra*.

JUDGMENT.

SIR HERBERT JENNER.

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This case was argued at great length, and with great learning and ability in the course of the last Term, and numerous authorities were referred to by the counsel on either side. The case itself is one of extreme importance, and the Court was therefore anxious, before pronouncing its opinion, to examine those authorities, and to compare them with the arguments adduced on the one side or the other.

This Court has no original jurisdiction in matters of this description. It is the general Appellate Court of the province, and it is only when requested to take cognizance of cases properly belonging to the Diocesan Courts that this Court entertains such suits. This case accordingly comes before the Court by letters of request from the Chancellor of the diocese of Lincoln. It is a criminal proceeding, technically described as the Office of the Judge promoted by Mr. Frederick George Mastin, a parishioner and inhabitant of the parish of Gedney, in the county and diocese of Lincoln, against the Reverend Thomas Sweet Escott, the vicar of that parish. The offence im-

puted is, that Mr. Escott refused to bury the infant child of Thomas and Sarah Cliff, who were inhabitants of the parish of Gedney, convenient notice, according to the canon, having been given to him for that purpose.

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The usual proceedings have been taken in this Court: the citation was returned; an appearance was given for the party cited; Articles have been given in, and upon those Articles eight witnesses have been examined. On behalf of Mr. Escott an Allegation was given in, pleading the substance of his defence. Upon that Allegation no witnesses have been examined. In fact, the allegation itself propounded rather matters of law than of fact, and referred in proof thereof to the laws themselves. They required in fact no evidence in support of them; and the only Article as to which there was any necessity of adducing proof, was that in which it was pleaded that the gentleman by whom the office of baptism in this case was administered was not an episcopally ordained minister, which was admitted in acts of Court.

Having thus stated the general nature of the proceedings, I will in the first instance refer to an observation very properly made by the counsel for Mr. Escott, as to the motives upon which the refusal to bury in the present instance was founded.

In the year 1809, a case of a similar description to this, almost identical in its circumstances, was brought before the Court for the judicial determination of my learned predecessor in this chair; (a) and in the course of those proceedings, Articles

(a) *Kemp v. Wickes*, 3 Phill. 264.

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were given, and the discussion of the question was taken, and in point of fact, the decision of the question was given upon the admission of the Articles. That judgment appears to have been very generally acquiesced in, or at least no case has been brought before these courts calling it in question, or impugning the soundness of the principles upon which it was based. It might therefore have been supposed, after an acquiescence of nearly thirty years, that the point had been considered as finally settled and determined. But although that decision was generally acquiesced in; yet it is notorious, that at the time when it was originally pronounced, there were not wanting some among the clergy who dissented from it, and who openly and in strong terms, and in no measured language, expressed their dissatisfaction with the grounds upon which it proceeded, though few, I believe, acted in opposition to it.

Of late years, however, the question has been revived, and several of the clergy, influenced no doubt by the most conscientious motives, have thought it advisable to bring the matter again forward, in order to a revision of the judgment alluded to, that, if the grounds of that judgment be found erroneous, it may be reversed, or, if correct, affirmed by the decision of the highest Court in ecclesiastical matters—that of the Queen in Council, with the advice of the Judicial Committee; and accordingly, the time for appealing from the sentence in *Kemp v. Wiekes* having passed, the question has been raised anew in the present case in this Court, as the only mode of obtaining the opinion of the ultimate Court of Appeal.

In the present case, the natural forum would have been that of the diocese in which the incumbent was beneficed, and where in point of fact the offence complained of was committed. But it was not thought convenient to institute proceedings there, and, consequently, the Chancellor of that diocese, in the usual manner, signed letters of request to this Court, as its immediate superior.

The question having been thus raised, I have no inclination nor right to find fault with the parties for determining to bring the matter to an issue. On the contrary, I think it is extremely desirable that a question of this great importance, which has produced so much excitement, and created so great an interest, should be finally set at rest: that can only be done by having recourse to the judgment of the supreme Court of Appeal, which has jurisdiction over all the dioceses of this kingdom; whereas the jurisdiction of this Court is confined to the province of Canterbury only, and it is extremely desirable that the practice in all the dioceses, whether in the province of Canterbury or in the province of York, should be placed upon one and the same footing, that there should not be one practice prevailing in one diocese, and a different practice in another.

The case of *Kemp v. Wickes* was also a single decision. It was a case *primæ impressionis*, and, therefore, that judgment, however able, and however elaborate, could hardly be considered as conclusive and of binding effect, like a series of decisions by the Courts of law upon the same identical point. The Court, then, feels that no apology is due on behalf of Mr. Escott for having

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again brought the question forward for judicial determination, feeling, as I have no doubt he conscientiously does, that the ordinances of the church forbid him to perform the burial service over a child circumstanced as was the child mentioned in the present proceedings. No apology is due for seeking to obtain a final and conclusive adjudication upon this question. I think, therefore, that this question has been very properly raised upon the present occasion ; and it is due to the parties to state, that there does not appear to have been, either on the one side or upon the other, any wish to excite irritation further than that which naturally arises from the agitation of such a point.

This case, also, is of great importance to the body to which the father and mother of this infant child belong, involving much more serious consequences to them than the mere question whether a child baptized by one of their own body is entitled to the offices of the Church at the time of burial. It is to them, I say, a matter of great importance ; for if the Court should be of opinion that Mr. Escott was justified in his refusal to bury this child, on the ground that it had not received baptism at the hands of a lawful minister, it will almost amount to a declaration, that in the eye of the law the great body of dissenters, who have mostly been so baptized, are not to be considered as Christians, as members of the Church of Christ. It is of the highest importance to them to know their real state and condition ; for it is no light matter, as is expressed by bishop Fleetwood, for a Christian man, living in the midst of a Christian country, to know whether he is to be considered as a Chris-

tian or not. Therefore I dismiss this part of the case, with the observation that I am extremely glad (except on one consideration, personal to myself) that this question has been raised, and that it will probably receive the adjudication of the ultimate Court of Appeal.

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I may here also, before I proceed to consider the merits of the case, notice a preliminary objection taken to the competency of the promoter to originate these proceedings. This objection was founded upon the answer given to an interrogatory addressed to several witnesses examined upon the Articles. The interrogatory was, "Bearing in mind the evidence you have already given in this cause, and the oath you have taken, do you not admit that the Wesleyans do in fact, as a body, affirm that it is lawful for ministers and lay persons to join together and make rules, orders, and constitutions in causes ecclesiastical, without the Queen's authority, and submit themselves to be ruled thereby? If you do not admit this absolutely and without qualification, will you take upon yourself conscientiously to deny that they do this in the ordinary sense of the above words?" And in order to fix Mr. Mastin, the promoter, as a member of the Wesleyan body, a further interrogatory was addressed to the witnesses, by which inquiry was made as to the profession, business, and station in life of the promoter, inquiring whether he was not a Wesleyan, and whether he does not now, (at the time of administering the interrogatory,) or has ever borne any and what office in the Wesleyan body.

Among the witnesses to whom this interrogatory

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has been addressed, one of them, Mr. Balley, the gentleman by whom the office of baptism was performed to this infant, has answered the question in the terms of the interrogatory. Mr. Bond, who is also a minister of that class, also answered it in the affirmative; but Mr. Balley adds this to his deposition upon this interrogatory; he says, "I certainly cannot take upon myself conscientiously to deny that the Wesleyans do this in the ordinary sense of the above words, although at the same time they profess to submit themselves to the Queen's authority implicitly." That is the qualification which Mr. Balley makes in his answer to this interrogatory, admitting, in the terms of the interrogatory, that they do affirm the tenets there expressed; but that, notwithstanding they submit themselves to certain rules and regulations not imposed by the Queen's authority, they nevertheless do admit her authority most implicitly. It has been contended upon this answer, that Mr. Mastin, as a Wesleyan, must be taken to support this doctrine, and that, as such, he falls within the provisions of the 12th canon of 1603, which declares, that persons who do so affirm are excommunicated *ipso facto*, and are not to be restored but by the bishop or by the archbishop after their repentance and public revocation of their wicked errors; and that in these Courts it is not necessary that, in a case of excommunication *ipso facto*, there should be a declaratory sentence, for that these Courts may take notice of the excommunication, although no such sentence may have been given; and it was contended that, as an excommunicated person, Mr. Mastin was disqualified from being promoter of the

office of judge, and consequently that all the proceedings in the present case were mere nullities. When this objection was first taken, I felt very considerable surprise; for having practised for a great number of years in these Courts, it was the first time that I had heard that a person, who was declared by a canon to be *ipso facto* excommunicated, was (with, I should say, one exception, of a case to which I shall presently advert) disqualified from suing in these Courts; for in the course of my practice in these Courts, I have known cases in which Dissenters of all classes have been suitors in these Courts in matrimonial cases, in suits for restitution of conjugal rights, in cases of divorce, in cases of defamation, in cases of brawling, and I never heard the objection stated, nor ever knew that the objection had been raised, with the exception of one class of cases which has been adverted to, and one of them mentioned by name by Dr. Harding, who argued in support of this objection.

If this objection were to be upheld, it would have a most extraordinary effect; the whole class of Wesleyans would be disqualified from suing in these Courts in consequence of this canon of 1603 declaring that persons who maintain the doctrines there stated are *ipso facto* excommunicated. The Court would be certainly most cautious in expressing an opinion that a canon of such a description could have such an operation; but in support of the objection so taken, reference was made to the case of *Scrimshire v. Scrimshire*, (a) In that case, Sir Edward Simpson said that "it was

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the constant practice in the Ecclesiastical Courts to repel the testimony of persons present at clandestine marriages till they have been absolved. Persons present at such marriages are excommunicated *ipso facto*; and in our Courts it is not thought necessary to have a sentence declaratory of an excommunication *ipso facto*; for the Court can *ex officio* take notice of it;" and he referred to the case of Colli, which had been so determined by Dr. Andrew, in the Consistorial Court of London, in 1751, the date of Sir Edward Simpson's decision being 1752.

The case of *Scrimshire v. Scrimshire*, was a suit brought by the wife against the husband for restitution of conjugal rights, and was founded upon a secret and clandestine marriage. The observation of Sir Edward Simpson occurred in speaking of the objection raised to the sufficiency of the proof, the witnesses to the marriage being, it was contended, incompetent to give evidence, as they were *ipso facto* excommunicate. In that particular case it seems that the incompetency of the witnesses had been removed by special act of grace; whether that act of grace extended to Mrs. Scrimshire as well as to the witnesses, does not appear. Nothing was said as to her competency to bring the suit. Sir Edward Simpson certainly there said that but for that act of grace, or by reason of absolution, before they gave their evidence, their testimony could not have been received; and it was accompanied with the observation, that in these Courts a declaratory sentence was not necessary in cases where the parties were *ipso facto* excommunicated. However, about two years afterwards, 17th June,

1754, there occurred in the Court of Peculiars, before Sir George Lee, then Dean of the Arches, a case of a similar description, being also a case for restitution of conjugal rights, founded upon a marriage in the Fleet, which was therefore a secret and clandestine marriage. That was the case of *Grant v. Grant*. (a) In the course of the proceedings, Dr. Collier, who was counsel for the husband, objected that the woman, by her own showing, was, by the constitution in Lyndwood, *De cland. dispon.*, under sentence of excommunication for being clandestinely married, and was not absolved, and therefore could not sue; and that the witnesses who were present at the clandestine marriage, and were therefore *ipso facto* excommunicated, had been, in order to render them competent to give their testimony, absolved in the Court of Peculiars, where the suit was pending, and not by the Chancellor of London, within whose jurisdiction the offence had been committed. He cites the before-mentioned case of Colli, in which Dr. Andrew had refused to pronounce his sentence till Mrs. Colli had been absolved. Thereupon Dr. Harris, who was counsel for Mrs. Grant, stated that Mrs. Grant was ready in Court to pray absolution as Mrs. Colli had done. Sir George Lee said that the case of Colli was new; that it had never been the practice of the Court of Peculiars to absolve a party to enable him or her to sue, and that he believed that it had not been the practice of the Consistory, except in that one instance. He says, "I was counsel in that cause, and was extremely dissatisfied with that judgment

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at the time when it was given by Dr. Andrew, and saw no reason to alter my opinion : that I thought the practice, by interpretation upon that constitution, had gone full far enough in disabling witnesses upon an excommunication *ipso facto*, without a denunciation, and that I would not extend it further, and introduce a new practice, by disabling a party to sue, and therefore over-ruled the objection; and as to the witnesses, wherever the offence was committed, they must be absolved *ad testificandum* in that Court where they were produced as witnesses."

Now, therefore, it should seem, that although under that particular canon witnesses were held to be disqualified and rendered incompetent to give their testimony, who had been present at a clandestine marriage, yet Sir George Lee would not hold, and it never has been the practice to consider, that the party in the cause ought to be absolved for the purpose of instituting a suit in the Ecclesiastical Court. One can understand with respect to witnesses why a declaratory sentence was unnecessary; because the very first moment of their appearing to give evidence of the fact of marriage, they would prove their presence, which would convict them, on their own showing, of the offence to which the penalty of excommunication *ipso facto* was attached. But with regard to the party who was proceeding to enforce her rights, Sir George Lee held that excommunication *ipso facto*, without denunciation, was not sufficient.

The case, therefore, of *Grant v. Grant* over-ruled the single case, as Sir George Lee considered it, of *Colli v. Colli*, in the Consistory Court; and

so strongly did Sir George Lee feel upon the point, that he would not permit the party to come forward to be absolved, although she was ready in Court, and offered herself for that purpose. In no other case does the question appear to have been raised; and very shortly after the decision of *Grant v. Grant*, the Marriage Act passed, which rendered all secret and clandestine marriages utterly null and void, and required all marriages to be solemnized *in facie ecclesiæ*. The case then of *Grant v. Grant* appears decisive as to the practice of the Court at that time; and it would certainly be somewhat strange, after the Toleration Acts, that the Court should pronounce that a party who held the doctrine imputed to him by this interrogatory, and every other individual of the same class and holding the same doctrine, were deprived, as persons excommunicate *ipso facto*, of the right of suing in the Ecclesiastical Courts.

The last act which passed with respect to ecclesiastical censure by excommunication, the 53rd of George III., c. 127, appears to me to be conclusive upon that point; for although the sentence of excommunication, as an ecclesiastical censure, is not abolished, yet no civil disabilities are to be incurred by a declaratory sentence or denunciation. The party, instead of being declared to be subject to all the pains and penalties, and to all the disabilities, which formerly attached to an excommunicated person, is now to be imprisoned for such time as the Court may direct, under the particular circumstances of the case; and it is expressly enacted by that statute, that no civil disability shall be incurred

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thereby; and certainly it would be incurring a civil disability if a person were not allowed to sue in these Courts. But it must also be recollected, that this is not a case in which the party promoting is suing for a right of his own. His own rights may to a certain extent be involved in the question; but he is only promoting the office of the judge in a suit in which the public are chiefly interested, although private interests may to some degree be concerned.

But again, I think it may well be doubted whether the 12th canon was directed against such persons as the Wesleyan Methodists: that body, of course, was not in existence at that time. It seems to me that this canon was directed against persons of a very different description—persons who were much more sturdy opponents to the discipline and government of the Church than are the Wesleyans as a body. It seems to me, that the class of persons against whom this canon was directed, were those of whom Cartwright (whose name was repeatedly mentioned in the course of these proceedings) was at the head—who were strong opponents to the government and discipline of the Church, and of whom King James the First, about the time at which these canons were passed, says, “I have learned of what cut they have been, who preaching before me since my coming into England, passed over in silence my being supreme governor in causes ecclesiastical.” (I am reading this from a note to Cardwell’s Conferences, at page 136.) Those are the kind of persons against whom the canon was directed; those who denied the King’s supremacy. It was argued upon the answer given

by the witnesses to the interrogatory in question, that the Queen's supremacy was necessarily denied from the manner in which these persons submitted themselves to be governed by their own laws. I confess, however, it would be very difficult to persuade me, from that answer, that Mr. Mastin was to be convicted (if I may so express myself) of holding those tenets which are imputed by the questions, and against which the canon to which reference is made was directed.

I am, therefore, upon these grounds, clearly of opinion that Mr. Mastin, as the prosecutor in this case for the interest of the public, not for his own private individual interest, is competent to promote the office of the judge, and that consequently the Court is bound to proceed to the consideration of the merits of the case.

The facts of the case are pretty much admitted on all hands. The Articles plead, first, that Mr. Escott, who is the party proceeded against, was the incumbent of the parish of Gedney, in the county and diocese of Lincoln; next, that he was bound to obey the laws, canons, and constitutions ecclesiastical of this realm.

The *Fourth* Article sets forth the 68th canon of 1603, upon which the present proceeding is founded. That canon is entitled "Ministers not to refuse to christen or bury," and ordained that "No ministers shall refuse or delay to christen any child according to the form of the Book of Common Prayer that is brought to church to him upon Sundays or Holydays to be christened, or to bury any corpse that is brought to the church or church-yard, convenient warning being given him thereof

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 against the party deceased were denounced, excommuni-
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 and notorious crime, and no man able to testify of
 his repentance, he shall be suspended by the bishop
 of the diocese from his ministry by the space of
 three month."

The *Fifth* Article pleads, " That notwithstanding
 this canon Mr. Escott had upon two several oc-
 casions, the 16th and 17th of December, expressed
 his determination not to bury in the churchyard of
 Gedney the infant daughter of Thomas Cliff and
 Sarah Cliff, his parishioners, if brought for burial
 to the churchyard ; and that in pursuance of such
 declared determination, the said Thomas Sweet
 Escott, on the 17th day of the said month of De-
 cember, or on some other day, did, contrary to his
 duty, refuse to bury in the churchyard of Gedney
 the corpse of Elizabeth Ann Cliff which was then
 brought to the churchyard, convenient warning
 having been given for that purpose."

The *Sixth* Article pleads, " That the child died
 within the parish, consequently that that was the
 place in which it was entitled to be interred—
 that it was the daughter of Thomas Cliff and
 Sarah his wife, who were Protestants, of the class
 of people commonly called or known as Wesleyan
 Methodists, and who had been in the habit of fre-
 quenting for some time previous to the 17th of
 December a chapel or place of religious worship
 established for that class, which was within the
 parish of Gedney—that the child had been bap-

tized on or about the 1st day of October in that year, 1839, according to the rite or form of baptism generally received and observed among the said class of people known as Wesleyan Methodists, that is to say (for this is the important point), that the child was baptized with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend Elisha Balley, a minister, preacher, or teacher of the said class of people commonly called or known as Wesleyan Methodists—that of the aforesaid fact of baptism Mr. Escott was informed, both on the 16th of December, 1839, by the father of the child, and on the 17th of that month by Mr. Bond, also a minister of the Wesleyan Methodists, who urged and entreated him upon those occasions to consent to bury the corpse, and that he was at the time of his refusal to bury the corpse sufficiently apprised and aware of the fact of baptism—that upon those occasions, as well as at the time when the child was brought to the churchyard for the purpose of interment upon the said 17th of December, application was made for the burial thereof in the manner prescribed by the Book of Common Prayer, and that Mr. Escott refused to comply with such entreaties.”

The *Seventh* and *Eighth* are merely general Articles, stating that the offence is one which subjects Mr. Escott to ecclesiastical proceedings, and that by virtue of the letters of request he is subject to the jurisdiction of this Court.

Such are the Articles upon which the present proceeding is founded: and all that was necessary for the purpose of these articles was to prove that this child was baptized by a Wesleyan minister—

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that Mr. Escott, the minister of the parish within which the child was born and died, was informed of that fact—that he was informed that they meant to bring the child for burial upon the day following that upon which the notice was given,—and that being fully apprised of that fact he refused to attend, and that the child was accordingly interred without the burial service being read over it.

All the facts thus stated in the Articles are either admitted in acts of Court, or fully proved by witnesses. I do not mean to refer in detail to the evidence. It is extremely desirable that all angry feeling should be laid aside in the consideration of this case, and that the question should receive its determination upon the true and proper ground, namely, whether a child who had received the outward and visible form of baptism (that is, had been sprinkled with water in the name of the Father, and of the Son, and of the Holy Ghost) by a dissenting minister, not being a lawful minister of the Church of England, nor episcopally ordained, as it is admitted was the case with respect to Mr. Balley who administered the rite, is to be considered as unbaptized and not entitled to have the burial service read at its interment, or whether the refusal to read the service over the child so baptized does or does not bring the party so refusing within the provision of the canon.

I have already said that the allegation of Mr. Escott propounds matters of law rather than of fact. The *First* Article of his allegation, after reciting the fifth of the promoter's Articles, pleads, "that Mr. Escott, in forming the determination of refusing to read the burial service at the interment

of the corpse of Elizabeth Ann Cliff in the churchyard of the parish of Gedney, was so far from acting in contempt of the laws, canons, and constitutions of the Church of England, that he acted in obedience to, and in conformity with, the laws and constitutions to which he had bound himself when he became an ordained minister of the Church of England."

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The *Second* Article pleads, "That in the preface to the form and manner of making deacons, as established by the Liturgy of the Church of England, it is expressly set forth and provided, 'That none shall be accounted or taken to be a lawful bishop, priest, or deacon in the United Church of England and Ireland, or sufficient to execute any of the said functions, except he be called, tried, examined, and admitted thereunto according to the form hereafter following, or hath had formerly episcopal consecration or ordination.'" Therefore putting in issue the fact of the validity of the administration of the baptism of this child.

The *Third* Article recites the *Sixth* Article, which I have read, in which it was alleged that the child had received baptism according to the Wesleyan rite by a minister of that class of people, and it pleads, "That such minister, teacher, or preacher was unordained, and that any rite or form of baptism performed by any such minister, teacher, or preacher is to all intents and purposes null and void in the sense of, and according to, the articles, canons, and rubric of the Church of England."

The *Fourth* Article pleads, "That from and after the conferences holden at Hampton Court in the year of our Lord 1603, the practice of the

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Church of Rome which had hitherto permitted the rite of baptism to be performed by laymen and midwives under license from the bishops of their respective dioceses, and which practice had been up to that period tolerated by the reformed Church of England, was repudiated by the ecclesiastical authorities of this realm, assembled at the said conferences of Hampton Court as aforesaid; and in order to give effect and force to such repudiation, King James I. directed and caused an alteration to be made accordingly in the Liturgy of the Church of England." And Mr. Escott alleges and undertakes to prove that from that period, namely, the period of the Hampton Court conferences of 1603, to the present day the Liturgy of the Church of England has not allowed the rite of baptism performed by unordained persons to be valid, but has held the direct contrary. That is the proposition which Mr. Escott undertakes by his counsel to establish.

The *Fifth* Article sets forth the Liturgy of 1595 (that is, the Liturgy in the time of Queen Elizabeth), in order to show the variations between the Liturgy of 1595 and those which are pleaded in the subsequent Article, and in order to show the alterations which had taken place in the opinions of the heads of the church assembled together to consider the revision of the Liturgy in 1603. And it then sets forth the rubric of 1595 as to the baptism of persons in private houses, "First, let them that be present call upon God for his grace and say the Lord's Prayer, if the time will suffer, and then one of them shall name the child and dip him in water, or pour water upon him, saying these words, 'I

baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.' ” And it pleads that this book is now remaining in the British Museum.

The *Sixth* sets forth the Liturgy printed in 1606, in which the rubric is as follows:—“ First, let the lawful minister and them that be present call upon God for his grace and say the Lord’s Prayer, if the time will suffer; and then the child being named by some one that is present, the said lawful minister shall dip it in water or pour water upon it, saying these words, ‘ I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost; ’ ” and it pleads that this book also is now remaining in the British Museum.

The difference between those two Liturgies consists in this, that whereas by the first, that of 1595, one of the persons present was to call upon God for his grace, and, if time would permit, to say the Lord’s Prayer, and then one of them was to dip the child or pour water upon it, and to pronounce the words, “ I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost; ” by the Liturgy printed in 1606, it is directed, that that should be done by the lawful minister. That is the distinction between those two Liturgies as set forth in this Allegation.

The next Article, the *Seventh*, sets forth the rubric to the Order for the Burial of the Dead, which was confirmed by act of Parliament in 13 & 14 Car. II. and which enjoins, that such office is not to be used for any that die unbaptized or excommunicated, or have laid violent hands upon themselves. That is the law now in force.

The *Eighth* recites the Fourth Article on behalf of

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the promoter which sets forth the 68th canon of 1603, and in contradiction, or rather, I may say, in explanation of that canon, it alleges that that "canon can only be taken and construed in conjunction with, and in reference to, the other constitutions and canons promulgated in the same code." And it goes on to plead, "that by the 9th of those canons, entitled 'Authors of Schism in the Church of England censured,' it is ordained that 'Whosoever shall hereafter separate themselves from the Communion of Saints, as it is approved by the Apostles' rules in the Church of England, and combine themselves together in a new brotherhood, accounting the christians who are conformable to the doctrine, government, rites and ceremonies of the Church of England to be profane and unmeet for them to join with in christian profession, let them be excommunicated *ipso facto* and not restored but by the archbishop after their repentance and public revocation of such their wicked errors.'" And it further refers to the 12th canon, entitled "Maintainers of Constitutions made in Conventicles censured," and recites those words which are embodied in the 14th interrogatory, addressed to the witnesses with a view to show that they held those tenets and therefore were under sentence of excommunication *ipso facto*. It is not now necessary to repeat those words as they have already been read by the Court. It then refers to the 5th canon, entitled "Impugners of the Articles of Religion established in the Church of England censured," in which it is ordained, that "Whosoever shall hereafter affirm that any of the Nine and Thirty Articles agreed upon by the archbishop and

bishops of both provinces, and the whole clergy, in the convocation holden at London in the year of our Lord 1562, for avoiding diversities of opinions and for the establishing of consent touching true religion, are in any part superstitious or erroneous, or such as they may not with a good conscience subscribe unto, let him be excommunicated *ipso facto* and not restored but only by the archbishop after his repentance and public revocation of such his wicked errors."

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The *Ninth* pleads the 23rd Article of the Thirty-Nine Articles, by which it is decreed, that "It is not lawful for any man to take upon him the office of public preaching or ministering the Sacraments in the congregation before he be lawfully called and sent to execute the same, and those we ought to judge lawfully called and sent which be chosen and called to this work by men who have public authority given unto them in the congregation to call and send ministers into the Lord's vineyard."

The *Tenth* refers to the 25th of those Articles in 1561, which ordained as follows, "There are two Sacraments ordained of Christ our Lord in the Gospel, that is to say, Baptism and the Supper of the Lord." And it alleges that Mr. Balley, referred to in the *Sixth* Article on behalf of the promoter, "is not a lawful minister and never hath received episcopal ordination or consecration, and that by reason of the premises Elizabeth Ann Cliff was not in fact baptized by the said Elisha Balley, but the said pretended baptism, if performed as therein alleged, was altogether invalid and contrary to, and in contempt of, the doctrine and discipline of the Church of England, and of the laws, canons, constitutions,

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and rubric hereinbefore more especially propounded and set forth."

The *Eleventh* Article was rejected by the Court for these reasons, that it set forth the discipline of Mr. Wesley which he imposed upon his followers, and in which he strongly repudiated the notion, that by sending them forth to preach they had authority to administer the Sacraments of Baptism and the Lord's Supper. The Court thought that by no possibility could this enter into the consideration of the question, as to the validity or invalidity of the baptism which this child had received. That what Mr. Wesley might have enjoined upon his followers to do, or to leave undone, could have no effect upon the decision of this question, and that such averments would involve the necessity of allowing the other side to set forth that which is stated in the answer to the interrogatory addressed to one of the witnesses, that at the later period of his life Mr. Wesley changed his opinion, and that either the great increase in number of his followers, or some other cause, rendered it necessary that he should depart from that rule which he had prescribed to them, and allow them to perform the office of baptism and to administer the Sacrament of the Lord's Supper. But in fact whatever their discipline might have been, whatever orders or rules might have been issued by Mr. Wesley for their government, that could not affect the determination of the Court upon the question which, as I have already stated, it is called upon to decide, viz. whether a child that had received the outward and visible form of baptism—that is, which had been in this case sprinkled with water in the name

of the Father, and of the Son, and of the Holy Ghost by a dissenting minister, that minister not being an ordained minister of the Church of England, nor episcopally ordained, as the fact is admitted to be with respect to Mr. Balley—whether that child so sprinkled was to be considered as within the terms of the rubric unbaptized, and not entitled to have the burial service read at its interment—or whether the refusal to bury that child and to read the service over it did or did not bring the party who so refused within the provisions of the 68th canon.

That canon expressly declares, that ministers who shall refuse to bury a corpse that is brought for that purpose, convenient notice having been given, shall be subject to the penalty of three months suspension, unless in the case of a person who had been denounced excommunicated *majori excommunicatione*. This, however, is not the only case in which a clergyman may refuse to bury; because by the rubric of 1661, which is the rule by which this Court must now be governed as the rule of the church, that service is not to be read over persons who die unbaptized or excommunicated, or who have laid violent hands upon themselves. The rubric of 1661 includes the disqualification mentioned in the canon and adds these other two disqualifications, namely, that of dying unbaptized or of being *felo de se*. These excepted cases being in derogation of a general right are to be construed strictly. The object of the church and of the legislature, which confirmed the rubric, must have been to exclude from the offices of the church all those who had never been admitted into it by baptism,

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those who having been once admitted into it had for some grievous offence been excluded from it; and, thirdly, those who, dying in the commission of mortal sin, had by their own act renounced the privileges of Christianity; the principle applicable to these three classes of persons being, that this service was not to be performed over those who were not at the time of their death members of the church of Christ. Such I take to be the sum and substance of the disqualifications which are mentioned in the canon and in the rubric.

The question, then, may now be assumed to be the validity or invalidity of a baptism administered by a person in the situation in which Mr. Balley stood at the time this child was baptized; whether a baptism so administered would be acknowledged by the church (I mean acknowledged as sufficient to remove the disqualification mentioned in the rubric), whether, in point of fact, this child was or was not "unbaptized;" for it is obvious that the child could not fall under the class of persons who were excommunicated, nor under that third class of persons who had laid violent hands upon themselves. In short, the question which the Court has to determine is, whether the term used in the rubric, of persons dying unbaptized, is to be applied only in cases where there has been a total absence of the rite, or whether it is to be applied in cases where there has been a want of qualification in the person by whom it was administered.

The first inquiry then is, what is essential to the administration of this Sacrament? It is admitted on all hands, that no baptism is valid unless the matter and the form of words prescribed at the in-

stitution of the Sacrament are observed and used, that is, that the child shall be immersed in or sprinkled with water, in the name of the Father, and of the Son, and of the Holy Ghost. That form was used with reference to this child, and therefore so far those things which on all hands are admitted to be essential to the validity of baptism, were duly complied with.

But it is contended, on behalf of Mr. Escott, that it is not enough that the outward and visible form or sign should be ministered, but that it must be administered by a person duly authorized and commissioned for that purpose; that is, since the year 1603, and more particularly since the year 1661, by an episcopally ordained minister, for that is the meaning of the words "lawful minister" mentioned in the rubric which forms the present law upon the subject; and that in fact the minister is a necessary part of the Sacrament, so necessary, that without him the administration becomes null and void.

The question, therefore, in this case, must eventually turn upon this, whether since the alteration in that rubric, an episcopally ordained minister is, as contended for by Mr. Escott's counsel, absolutely necessary to the valid administration of this rite? If this be so, it will follow as a matter of course, that this prosecution must fall to the ground, and the defence set up by Mr. Escott will be completely established, namely, that in refusing to read the burial service over this child, he was acting in conformity with, and not in opposition to, the law of the church of which he is a minister. On the other hand, if it shall appear that the minister is not a necessary part of the Sacrament,

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but only to the orderly and proper administration of it, and that the Sacrament itself is sufficiently administered, even when administered by uncommissioned or unauthorized hands, then Mr. Escott will have offended against the law, and will have incurred the penalty of the canon.

When I state that the question is, whether baptism administered by any other than a minister who has received episcopal ordination is valid or invalid, I entirely disclaim any intention of entering into the theological discussion of this much controverted point, which has employed the talents and pens of so many able, learned, and pious men. The decision of that question belongs not to this Court; all that it has to do is to endeavour to ascertain whether the Church of England has expressed any decided opinion upon it, and what that opinion is; and according to that opinion to pronounce its decision. The law of the church is that alone which this Court is called upon or is competent to administer; and by that law the Court must be governed, without indulging in speculations of its own, whether the law is founded in error or in truth.

After the admission in Mr. Escott's allegation, that the practice of lay baptism was tolerated by the Church of England down to the year 1603, it may at first sight appear superfluous to travel back to any earlier period for the purpose of ascertaining the time at which, and the extent to which, this practice had been admitted into the church. But as the admission itself was in some degree qualified in Mr. Escott's allegation, which stated that the practice of the Church of Rome, permitting baptism

by laymen and by midwives, under license from the diocesan, had been tolerated by the Church of England down to the year 1603, and as it was strongly urged in the course of the argument, that the introduction of baptism at all by laymen and by women, was one of the corruptions of the Church of Rome, of which it was the object of the Reformation to purge the church, it may not be altogether useless shortly to trace its progress from the time of its introduction into the Catholic Church to the period of the Reformation, in order that we may be enabled the better to judge how much is to be charged to the corruption of the Romish Church, and whether any and what part of it has been derived from the ancient or primitive church. "By the custom of the primitive church we mean (say the reformed divines in the first proposition disputed in Westminster Abbey, in 1559) the order most generally used in the church for the space of five hundred years after Christ, in which times lived the most notable fathers, as Justin, Irenæus, Tertullian, Cyprian, Basil, Chrysostom, Hierome, Ambrose, Augustine, and others." (a)

In order to arrive at a correct view of the present state of the law, it is necessary to see how the law stood at the time in which the alleged alterations are represented to have taken place. It was stated in the case of *Kemp v. Wickes*, (b) and is undoubtedly true, and cannot be controverted, that "the law of the church is to be deduced from the ancient general canon law, from the particular constitutions made in this country to regulate the English Church,

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(a) Cardwell's Conferences, p. 56.

(b) 3 Phill. 276.

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from our own canons, from the rubric, and from any acts of Parliament which may have passed upon the subject, illustrated by the writings of eminent persons." Those are the guides which this Court must take for its direction in the investigation into the former and present state of the law of the church upon the subject of baptism, for the inquiry into the present state of the law may be very materially assisted by its former state.

It was observed in argument, that at the first institution of this Sacrament, the administration of it was confined to the Apostles, and afterwards descended to their successors, the bishops of the church, and to those who were duly commissioned by them, and that this continues to be the law down to the present time. This proposition will admit of no dispute, so far as affects the orderly and regular administration of the rite; although it is matter of dispute, and is indeed the whole subject of dispute in this case, whether the administration of it by others than persons so commissioned is or is not within the view of the church, a valid administration of the rite.

I need not state that the practice of the primitive church is that to which the Court would pay the greatest attention. Now, in the very early, if not in the earliest, ages of the church, baptism by lay hands, in the name of the Father, Son, and Holy Ghost, was practised, and was allowed to be valid, and upon no account to be repeated.

It appears that so early at least as the end of the second or beginning of the third century, the practice had obtained to a certain extent; for Tertullian, who lived at that time, wrote upon the very subject;

and reference might be made to a vast number of passages in his works, in support of the validity of lay baptism under certain circumstances. He thus expresses himself in the 17th chapter "*De Baptismo.*"—" *Dandi quidem habet jus summus sacerdos, qui est episcopus. Dehinc presbyteri et diaconi non tamen sine episcopi auctoritate, propter ecclesiæ honorem, quo salvo salva pax est. Alioquin etiam laicis jus est; quod enim ex æquo accipitur ex æquo dari potest.*"

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It has been indeed said, that the reason given by Tertullian for admitting the validity of lay baptism is so weak and unfounded as to detract from the weight to which the opinion of so learned a person would otherwise have been entitled. But his authority is not appealed to for the purpose of asserting the validity of lay baptism, but in order to shew that the practice had obtained, to some extent at least, at this very early period of the church, and as a necessary consequence, that it was not a part of the corruptions of the Romanists which had been introduced into and adopted by the Church of England.

Whether, therefore, the grounds upon which Tertullian advocated and maintained the validity of lay baptism be sustainable or not, he is at all events a most valuable witness (and has been always so considered) to the existence of the practice of lay baptism in his time.

On the other hand, St. Cyprian and Firmilian, who lived at a later period of the same century, maintained that baptism by any other than those who were duly and properly commissioned, was altogether null and void, and that persons baptized

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by heretical and schismatical priests, during the time of their heresy and schism, were not sufficiently baptized, and ought to be baptized again, because by their heresy and schism they had been reduced to the state, if not below the state, of laymen; for all these discussions arose upon the point whether baptism was or was not to be repeated, it being the general, indeed universal, doctrine, according to the general meaning which had been attributed to this passage in St. Paul's Epistle to the Ephesians, "one Lord, one faith, one baptism," that baptism once validly administered, was not to be repeated. St. Cyprian and Firmilian maintained that those sprinklings were null and void *ab initio*, in consequence of the heresy and schism of those by whom the rite was administered, and consequently that there was in such cases no reiteration or repetition of baptism, because, in point of fact, baptism had never been administered.

But this opinion of St. Cyprian and Firmilian was not generally adopted; it was expressly overruled by the council of Arles: for it was said that the priestly character being once impressed, was indelible, and that the commission could not be revoked or lost by any acts of those to whom it had been entrusted. And therefore the opinion seems to have prevailed, that schismatical and heretical baptisms, being performed by persons who had been originally duly commissioned, were good and valid, provided the proper matter and form were used and observed.

These writers, again, are referred to only to shew, that at this time the controversy upon the point continued, and not for the purpose of establishing

the validity or invalidity of the administration of the rite.

A great division of opinion upon this point prevailed for a considerable time. The Eastern and Western Churches embraced different sides of the question. The Eastern Church did not adopt lay baptism till long after the time when the Western Church had embraced it. But towards the middle or the end of the fourth century, or the beginning of the fifth century, the legality of baptism administered by laymen was upheld by St. Austin, who has ever been looked upon as one of the most learned and pious of the fathers of the Church. From this time the practice prevailed, and was allowed in both the Eastern and Western Churches; and the great objection which appears to have been made, not to the character of the testimony as to the existence of the practice, but to the value of the opinion as to the validity of that practice, was, that St. Austin had embraced that opinion, upon an erroneous notion that baptism was absolutely necessary to salvation—that no person could by possibility be saved unless he had been previously baptized; founding it upon an erroneous application of the text of Scripture, “Unless a man be born of water and of the Spirit he cannot enter into the kingdom of Heaven.” Now, supposing St. Austin had embraced that opinion, and supposing he had embraced it to such an extent as is contended for by the writers who maintain the opposite doctrine, upon an erroneous application of this passage of Scripture, it would make nothing against his testimony as to the existence and adoption by the Church of the practice of lay

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baptism ; and if the practice did exist in, and was adopted by, the Church at that time, that is all that is necessary for the present consideration of the Court. The existence of the practice at this very early period—during the first four or five centuries, the best and purest ages of the Church—shows that the practice does not owe its origin to the corruptions of Rome. That many superstitions were engrafted upon this practice is true, but that will not affect the present question. And the evidence of Tertullian, St. Austin, and St. Jerome, is sufficient to establish the fact that the practice existed at this time.

After the time of St. Austin, the ancient canons bear ample testimony to the universal adoption of it as the rule and order of the Church. That such was the rule and order of the Church is to be collected from a vast number of passages to be found in the different books which constitute the canon law. It would be useless for the Court to refer to the particular canons and constitutions which apply to this subject. It is sufficient to state that the validity of lay baptism was recognized, not only by the general canon law of Europe, and throughout the Eastern and Western Churches, but also by the law of England, and of the English Church, long before the Reformation.

The titles of many of the paragraphs in the third part of the decree "*De Consecratione*," were enumerated by my learned predecessor, in his judgment in the case of *Kemp v. Wickes*, and are to be found in the report of that judgment, and every one of them is strictly applicable to the present proceeding ; and, therefore, the Court

would refer to, and invoke them as a part of its judgment in this case. The passages there cited are derived from St. Austin and St. Isidore. Though the catalogue might be increased almost *ad infinitum*, I will only at present refer to one or two additional passages from the particular law of our own church, which show that the doctrine of the ancient church was adopted in this country to its fullest extent, and that a great part of our baptismal service has been formed with reference to these particular canons and constitutions. These passages are to be found in the provincial constitutions made by the several archbishops of Canterbury and the provincial synods, from the time of Stephen Langton in the reign of Henry III., down to the time of Henry Chicheley in the reign of Henry V., and thenceforward to the time of the Reformation. Such of these constitutions as were in existence in 1463, were in that year adopted by the province of York; and the whole body of these constitutions were declared by the statute of 24th of Henry VIII. to be part of the law of England, so far as they were not inconsistent with, and opposed to, the common law, the statute law, or the prerogative of the crown; and they consequently remain at the present day the law of the Church of England, provided they do not fall under either of those exceptions.

Lyndwood has collected those several constitutions, and has also in a most learned gloss upon them set forth what the law was at the time at which he wrote. Though Lyndwood may be styled a Roman Catholic canonist, and on that account not to be relied upon on a question which

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relates to the law of the church at the present time, yet he is a most learned and sound expositor of the law as it stood at the time when he wrote his gloss, and the standard authority on all points of the canon law which may arise in the administration of justice in these Courts. Still I do not refer to Lyndwood as an authority for the law of the Church at the present day, except so far as that law remains unaltered from his time.

Under the title "*De Sacramentis iterandis vel non*," book i, title 7, page 40, is a constitution of Archbishop Peccham in the year 1281. "*Baptismus etiam a laicis ritè administratus non est a sacerdote iterandus*." It has been argued in this case that lay baptism was tolerated only by the Romish Church, and by the Church of England, in cases of absolute necessity. Lyndwood however has a gloss upon the word "*necessitatem*," which occurs in the constitution just mentioned, and I refer to that gloss for the purpose of showing that in cases of absolute necessity lay baptism was not only tolerated but enjoined; and that though no absolute necessity might exist, yet baptism once administered *modo et formâ*, which Lyndwood explains to be with water in the name of the Father, and of the Son, and of the Holy Ghost, was a sufficient baptism and was not permitted in any way to be repeated. In commenting then upon that word "*necessitatem*," he says, "*Quia forsan timeatur de ejus morte imminente quo casu cuilibet licet baptizare etiam patri: unde et hæreticus tempore necessitatis potest baptizare, dum tamen cum debita intentione baptizandi sicut formam ecclesiæ*." He then mentions other cases in which such baptism

might be administered, and he concludes with these words, "*Scius tamen quod laicus sine necessitate baptizans peccat, nam baptizare sacerdotis proprium est officium, et hoc verum solemniter. Quod licet presbyter baptizare possit præsente episcopo quia de officio suo est: tamen præsente presbytero clericus baptizare non debet, nec laicus præsente clerico, nec mulier præsente viro.*" So that here he says, that though the priest, whose proper office it is to administer the Sacrament, may administer it in the presence of the bishop, yet the "clericus," that is, a person in office below that of the priesthood, could not and ought not properly to administer the Sacrament in the presence of the priest—that yet in his absence he might administer it; and though a layman might not administer it in the presence of the "clericus," nor a woman in the presence of a man, yet they were all of them at liberty to administer the Sacrament, provided the necessity was *absolute* at the time.

Then under the title "*De Baptismo et ejus effectu*," (a) there is a gloss pretty much to the same effect, with respect to the offence which is committed by a layman baptizing a child without any necessity. The effect for which I at present cite that, is to show, that the baptism administered by a layman where there existed no necessity, for that administration arising from the dangerous illness of the child or from other circumstances was itself good. He says, "*Pro vero tamen teneas quod extra casum necessitatis solus sacerdos est debitus minister ad Sacramentum baptismi. Pec-*

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(a) Book iii., tit. 22, p. 241.

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caret mortaliter aliquis non sacerdos baptizans. præter quam articulo mortis. Si tamen de facto aliquis non sacerdos baptizaret extra articulum necessitatis, cum tamen debitâ intentione et in formâ Ecclesiæ, tenet Baptismus ad effectum, quod sic baptizatus non debet rebaptizari. Et idem dico de non baptizato baptizante, quia bonitas sive sanctitas ministri non est de necessitate baptismi, sed de congruentiâ." Therefore it is quite clear from this passage, that at this time, at least in the Church of England, baptism though administered by a person who was not duly qualified for that purpose, if administered in the proper form and with the proper words, was a good and valid baptism, at least to the extent that the baptism was not to be reiterated. And there are passages in the law which show that the repetition of baptism once administered *modo et formâ*, that is, with water and in the name of the Trinity, was to be punished, in the case of a person in holy orders, by deposition or by other severe punishment, and in the case of a layman by excommunication.

I have referred to these passages for the purpose of showing that by the law of the Church of England at this period, the validity of lay baptism, to the effect at least that it was not to be repeated, was admitted; and consequently, as all this remained unrepealed and without any alteration up to the time of the Reformation, that it is to be taken to have been the actual law to be observed by all persons in the Church of England at that time,—that baptism so administered was to be considered as good and sufficiently administered. So important, moreover, did the Church consider the adminis-

tration of this rite, that it enjoined the ministers to instruct their parishioners in the proper form of baptism, that in case of necessity arising, in case of circumstances occurring, which imperatively called for the administration of it without delay, there might be no difficulty in administering that right which, whether, wrongly or rightly, was considered necessary to salvation.

Such was the law of England up to the time of the Reformation. I have already stated that the canon law, so far as it had been received in this country, and these provincial constitutions were confirmed by an act of Parliament of the 24th of Henry VIII., so far as they were not repugnant to the common law, to the statute law, or to the prerogative of the crown; and, therefore, so far as they have not been altered by later statutes, thus continue to be the law at the present day.

At the time of the Reformation various alterations took place. The first of those alterations to which I shall refer is that which took place in the reign of Edward VI., for although the Reformation had made considerable progress during the reign of Henry VIII., it does not appear, I think, that any material alterations were made in the Liturgy of the Church until the reign of Edward VI.

In the time of Edward VI., the Liturgy of the Church of England was reduced into order and revised. There were during his reign two Liturgies in Prayer Books published, one in the year 1549, and the other in the year 1552; and in those books the title of the form of private baptism was as follows:—“Of them which be baptized in private houses in time of necessity.” Then fol-

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lowed this rubric, "The pastors and curates shall warn their parishioners that they defer not the baptism of infants longer than the Sunday, or other holyday, next after the child shall be born, unless upon a great and pressing necessity, to be allowed by the curate; and also they shall warn them, that without great cause or necessity they baptize not children in their houses: and when great need shall compel them to do so, that they administer it in this fashion: First, let them that be present call upon God for his grace, and say the Lord's Prayer, if the time will suffice; and then one of them shall name the child, and dip him in the water, or pour water upon him, saying these words, 'I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.'" This having been so done, those persons having thus called upon God, and one of them having thus dipped the child into water, and said the proper form of words over it, this declaration as to the validity of the baptism so administered follows, "And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again."

Nothing can be more plain and express upon the face of this direction in the rubric, than that the child is to be in cases of necessity baptized by one of the persons present, and that being so baptized it is beyond all doubt sufficiently baptized; for it is said, "Let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again."

So far as this Prayer Book of Edward VI. goes, (and the second Prayer Book is pretty much to the

same effect, and without any material alteration,) it is in confirmation of that which I have already shown, by various authorities, to have been the ancient law of the Church. It proves that after the Reformation, at least to the time of Edward VI., lay baptism in cases of necessity in private houses was considered to be a good and sufficient administration of the Sacrament, so that the child ought not to be brought to the Church for the purpose of being again baptized.

But the rubric goes on to direct, that if the child lives it is expedient that he be brought to the church to the intent that the priest may examine whether the child be lawfully baptized or not. Now, considering what the law of the church was at this time, it is hardly capable of being made a question whether this was not a direct and positive authority for the administration of baptism by laymen. Before this time, as we have seen, it was the universal practice of the church to acknowledge such baptism as valid, and if an alteration in that respect was intended, care would have been taken to guard against the continuance of the ancient practice. In the rubric there is not a single allusion to the "priest" in the administration of the rite. But when the child is directed to be brought to the church, then for the first time the priest is mentioned. From this, it would seem, that in cases of necessity, the absence of the priest at the time of baptism and its administration by a layman and not by a priest, were almost necessarily presumed. The mention of the priest is first introduced when the child is directed to be brought to the church in order to ascertain that all things were done as they ought to

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have been done, then he was to satisfy himself by inquiry of those who brought the child to the church in what manner and form the child had been baptized, and, being satisfied upon that head, he was to certify that in that case they had done well and according unto due order in baptizing the child. Neither is the reception of the child into the church of Christ of the essence of the Sacrament. The baptism is complete when the child is named, and when it is sprinkled with water, in the name of the Holy Trinity, for it is then that the sufficiency of it is declared. If the child had died at that moment there could be no doubt as the law then existed that the baptism itself would have been good, valid, and sufficient. But as matter of expediency, in order that the congregation might be informed whether the child had been duly and sufficiently baptized or not, it was thought expedient that the child should be brought to the church, in order that the priest might satisfy himself that all things were done as they ought to be by those who were present at the time of the baptism, and might certify to the congregation that all was well done and in due order. Here, then, lay baptism is declared to be valid ; and this rubric was confirmed by act of Parliament.

The first Prayer Book of Edward VI. in 1549, was revised in the year 1552, but no material alteration in this service appears to have been made. Upon the death of Edward VI., when Queen Mary succeeded to the throne, everything was restored to the state in which it stood previous to the Reformation ; the Romish ritual was again brought into use, and the acts of Parliament which had been passed

in the former reign with respect to religious matters were repealed. But upon Queen Elizabeth's accession to the crown those acts of Mary were in their turn rescinded; and then the Prayer Books of Edward VI. were again published, and again became the rules by which the offices of the church were to be governed.

Those Prayer Books, with the rubric which I have already stated, with respect to private baptism in houses, and with respect to the sufficiency of private baptism by a person other than a priest, continued to be the law during the reign of Queen Elizabeth with certain exceptions, to which I shall presently allude. No other Prayer Book was published, I think, till the year 1595, when Queen Elizabeth's Prayer Book was published, which was to all intents and purposes the same, as (at least there was no material variation from) the book of Edward VI. During the interval, however, between 1559 and 1595, various conferences had taken place upon the subject of alterations proposed to be introduced into the Book of Common Prayer, and, amongst other things, it was required by the Puritans that the Liturgy should be so altered as to exclude women from administering the Sacrament of Baptism. In year 1565, a long correspondence upon the subject took place between Bishops Grindal and Horn with Bullinger and Gualter of Zurich. In their letter, Bullinger and Gualter complained very much of the continuance of abuses in the church—those abuses are specified at very great length in a letter which is to be found in the third volume of *Burnet's History of the Reformation*—and amongst others (which alone it is necessary at

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present to advert to) they complained that the baptism of women in cases of necessity was still retained as part of the order of the English church; they complain "*Mulieres in casu necessitatis privatim posse et debere baptizare infantulos.*" This shows that in 1565, at the date of this correspondence, the practice was still continued in cases of necessity, not only of women baptizing infants, but *à fortiori* that baptism was administered by laymen.

In reply to this, Bishops Grindal and Horn, in a joint letter, express their opinion in these words, "*Mulieres et posse et debere baptizare infantulos nullo modo prorsus assentimur.*" They did not agree to the doctrine of the church—that it was right and proper that women should still baptize children. That, however, continued to be the law, and unless that law has been altered it must continue to be the law of the church: nothing appears to have been done till the convocation of 1575. At that convocation, which was a general convocation of the province of Canterbury, (I think it does not appear that the province of York had any concern or connexion with that convocation,) certain canons, fifteen in number, were made and agreed upon; and, amongst others, there was one which went directly to prohibit the administration of private baptism by any but a lawful minister, or by a deacon called to be present for that purpose. Great stress has been laid by those who deny the validity of lay baptism upon that article, as the object of it purports to have been to remove any ambiguity and doubt as to the persons by whom private baptism was to be administered.

The history of this canon is involved in great mystery and obscurity. The canons, I have stated,

were originally fifteen in number; the fifteenth, I think, was withdrawn, in consequence of the Queen having refused her assent; thirteen only were printed. This canon, in particular, which related to the subject of lay baptism, was not printed with the others, though it is asserted that it was published, and possibly may have been circulated in manuscript. Gibson, in his first volume, page 369, says, that "This article was not published in the printed copy, but whether on the same account that the fifteenth article was left out, that is, because it was disapproved by the crown, I cannot certainly tell." Such is Gibson's observation with respect to this article.

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Collier, in his *Church History*, (a) has given a copy of this canon. It is the 12th canon of 1575, and he states, "This article, being particularly remarkable, I have given it in the words of the record." And therefore he must, I presume, have had access either to one of the original copies of the canon or to the canon itself.

The canon is in these words, "And whereas, some ambiguity and doubt has arisen among divers, by what persons private baptism is to be administered, forasmuch as by the Book of Common Prayer allowed by statute, the bishop of the diocese is to expound and resolve all such doubts as shall arise concerning the manner, how to understand, do and execute the things contained in the same book, it is now by the said archbishop and bishops expounded and resolved, and every of them doth expound and resolve, that the said private baptism, in case of

(a) Vol. 2, p. 552.

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necessity, is only to be administered by a lawful minister or deacon called to be present for that purpose, and none other." So that here there are words affirmative and negative. It is "to be administered by a lawful minister or deacon called to be present for that purpose and none other," and that "every bishop in his diocese shall take order that the exposition of the said doubt shall be published in writing before the 1st day of May next coming, in every parish church of his diocese in this province, and thereby all other persons shall be inhibited to intermeddle with the ministering of baptism privately, it being no part of their vocation." As I have already stated, this is given in the words of the original canon according to Collier.

This undoubtedly is a very strong expression of the opinion of the convocation, that private baptism, in cases of necessity, was only to be administered by a lawful minister, or by a deacon called to be present for that purpose, and none other; and shows that though up to this time lay baptism was considered sufficient for certain purposes at least, and ought not to be repeated, yet now there was a great alteration in the opinions of the heads of the church and of the crown, if assented to by the Queen, and that that which had been the law under the rubric of Edward VI. was no longer to be tolerated.

If the mandate for its publication (for it is the mandate of the archbishop) was obeyed, the copies of it must have been very numerous, yet no copies of it have been found. It is on all hands agreed, that it was not printed and published in that form with the rest of the canons. And that no trace of it should be found except two or three copies preserved in the

public repositories—that there should not be found in the books or registries of any of the dioceses any allusion to its publication in the parish churches of those dioceses, is most extraordinary, considering the very great importance which must be supposed to have been attached to such a canon at the time. No allusion whatever is made to it that I have been able to find in any contemporary writer. It does not appear to have been mentioned at the Hampton Court conferences in 1603. It is not mentioned by Hooker who wrote in 1585 or 1586. This document seems, so far as I have been able to ascertain, either to have been suppressed immediately after it was passed, or if it was published at all, was never considered to have any binding authority.

That canon, must, however, have been agreed upon by the convocation, because the archbishop's mandate for its publication is added to it, and it is not impossible that it might have received the Queen's assent, but for some reason or other it never appears to have had effect or operation given to it: whether it was that it went too far as an act of the convocation, in purporting to repeal the rubric of Edward VI., which had been confirmed by act of Parliament, and, therefore, it was not thought proper to publish it with the rest, though two or three copies might get abroad: whether it was supposed that the bishops had exceeded the authority given to them by the preface to the Book of Common Prayer, which is also confirmed by the statute, to expound doubts and ambiguities in the respective dioceses, upon application made to them by the clergy for the purpose, and that they had not only

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expounded, but in point of fact repealed the statute, —what, in short, was the ground upon which it was not published the Court is unable to conjecture. But certain it is that the only copies to be found of it are those two or three which I have mentioned, from one of which, that which is printed in Collier was taken. Surely the effect of this canon being to introduce an entirely new principle, to supersede a practice which had endured from the third or fourth century down to the time of the Reformation, and which had been continued through the reigns of Edward VI. and Queen Elizabeth, down to the time of 1575, it would have been most important to show that it was observed and acted upon.

And the non-appearance of this very important document is rendered still more extraordinary by the circumstance, that in the year 1584 a memorial or address was presented to Archbishop Whitgift by the Puritans, nine years after the passing of this canon, praying, amongst other things, “That all baptizing by midwives and women may from henceforth be inhibited and declared void.” That is to be found in *Strype's Life of Archbishop Whitgift*. (a) If this act of convocation had been acted upon and had been put into operation, the practice of baptism by midwives and women must have been suppressed from that time. If this was the law which was to be carried into execution, it would have had its effect, and that effect would have been to abolish the practice of baptizing by midwives and by women. But so far is it from having had that effect, that to this address, presented

(a) Vol 3, p. 135.

to him on the part of the Puritans, the archbishop replied "That the baptism ministered by women," and, therefore, *à fortiori* by laymen, "is lawful and good, howsoever they minister it, lawfully or unlawfully, (so that the institution of Christ, touching the words and elements, are duly used), no learned man ever doubted until now of late, some one or two, who, by their singularitie in some poynts of religion have don more harme and given to the adversarie greater advantage than any thing ells coulde doe." This was in 1584, nine years after the passing of this act of convocation. "Neither," says he, "any of the fathers nor that councell," referred to in the address—the council of Carthage, ever condemned the baptizing of women in the case of necessitie and extraordinarie. But that they should baptise ordinarilie and without necessitie the Papists themselves doe not allow. I never herde that any bishopt, professing the gospell, did give any such authoritie to midwives," that is, to baptize ordinarily, except in cases of necessity. Therefore Archbishop Whitgift maintains the sufficiency of lay baptism by women up to the year 1584, nine years, as I have already said, after the passing of this act of convocation.

We do not find that the practice was discontinued after 1584. On the contrary, in the year 1595 Queen Elizabeth's Prayer Book is published, containing the very same rubric and the same directions for the performance of private baptisms, as were contained in Edward the Sixth's Prayer Books in 1548 and 1552, and it is most extraordinary if this act of convocation was supposed to have, or intended to have, the effect which has been contended for in

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the argument, that this practice should have continued, and that no notice should have been taken of it in that Prayer Book which was published by Queen Elizabeth in 1595, but that the rubric therein contained should be of precisely the same tenor as that which had been contained in the Prayer Books of Edward VI. in 1548 and 1552, and should have directed that one of the persons present should dip the child in water, or pour water upon him, using the proper form of words; and that having so done, they were not to doubt that that child was well and sufficiently baptized, and ought not to be baptized again.

Nor is it contended that the practice of lay baptism ceased at this time. It is admitted on the part of Mr. Escott, that the practice of lay baptism, which had prevailed for nearly 1200 years before, continued to be tolerated, though not approved, down to the period of the Hampton Court conferences in 1603.

Immediately upon the accession of James I. the Millenary Petition, as it was called, from the great number of names subscribed to it, was presented to him, in which the Puritans of that time complained again of the existence of the practice of baptism by women, and required that baptism should not be administered by women, and that it should be so explained; at this time, therefore, it is evident that the practice still continued. It is remarkable that in this address of the Puritans their demand was limited to the abolition of the practice of baptizing by women and by midwives. Their objection was not to the practice of baptism by laymen according to the practice of the primitive church.

The consequence of this petition was, that a conference was held at Hampton Court between a certain number of persons selected on the part of the Puritans, and certain bishops, eight in number, six deans, the dean of the chapel royal, and two doctors of divinity. The first of these conferences was held on the 14th of January, 1603, in the presence of the King and the lords of the council.

A short account of what passed at that conference was communicated to some friends in Scotland by Dr. James Montague, the dean of the chapel royal, in a letter dated 18th of January, 1603, and is to be found in the *History of the Conferences on the Book of Common Prayer*, page 128, published by Dr. Cardwell. It is there stated, that the points propounded by the King for discussion were six ; three were respecting alterations proposed in the Common Prayer Book, two with respect to the bishop's jurisdiction, and one with respect to the kingdom of Ireland. The three alterations proposed in the Book of Common Prayer related to the general absolution, to the confirmation of children, and the private baptism by women. The latter is that to which alone it is necessary that the attention of the Court should be addressed for the present purpose.

The discussion upon private baptism, as Dr. Montague states, occupied three hours at least, "the King alone disputing with the bishops so wisely, wittily, and learnedly, with that pretty patience as I think never man living heard the like ;" and then he states that "in the end he won this of them, that baptism should only be administered by ministers, yet in private houses if occasion required, and that whosoever else should baptize

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should *be under punishment.*" Not that the baptism should be annulled, but that if any person except a lawful minister should take upon himself to perform the ceremony of baptism, that person should be punished. It was not that the person so baptized should be rebaptized, but that the administrator, who had usurped the priest's office without authority, should incur the censure of the law.

"To this narrative," says Cardwell, "was added the following note of such things as shall be reformed." Then follows a summary of the result of the discussion, under fifteen heads: and Dr. Cardwell states in a note, "This is copied from Strype, (Whitgift, vol. ii. page 501,) who took it from a paper in the hand-writing, as he believed, of Bishop Bancroft (of London)," one of the bishops who were present at this conference. The third head is, "The private baptism now by laymen or women shall be called, 'the private baptisme by the ministers only, and all those questions in that baptisme that insinuate it to be done by women taken away.'"

A more particular account of what passed, and of the views entertained by the several bishops who attended at that conference, is given by Dr. Barlow, who was dean of Chester, and who was also present upon that occasion, (*Cardwell's Conferences*, p. 169;) it is headed, "The Summe and Substance of the Conference which it pleased His Excellent Majestie to have with the Lords, Bishops, and others of his Clergy, (at which the most of the Lords of the Councill were present,) in his Majestie's Privy Chamber at Hampton Court, January 14, 1603. Contracted by Wm. Barlow, Doctor of Divinity,

and Dean of Chester." He gives a history of the first day's conference, and the names of the bishops who were present, and then states the points for discussion as they had been stated by Dr. Montague. He says, "The third was private baptism; if private for place, his Majesty thought it agreed with the use of the primitive church; if for persons, that any but a lawful minister might baptize anywhere he utterly disliked; and in this point his Highnesse grew somewhat earnest against the baptizing by women and laikes." He goes on to state, (in page 174,) after some discussion upon other points, "In the third place, the lord archbishop (that is, Whitgift,) proceeded to speak of private baptism, showing his Majestie that the administration of baptism by women and lay persons was not allowed in the practice of the church, but inquired of by bishops in their visitation, and censured; neither do the words in the book infer any such meaning."

Now, if Archbishop Whitgift meant to say that the words of the rubric of Edward VI. did not contain any permission for laymen to baptize, it is certainly extremely difficult to know what words could express that meaning with more perspicuity and more expressly. But if he meant that it was not intended to encourage, or to sanction, the administration of that rite except in cases of necessity by women or by laics, then we can understand his meaning when he says that the words do not infer any such meaning, that is, that baptism by women and laymen was not allowed by the church except in cases of necessity, and that inquiry was made by the bishops, in their visitation, and a censure passed upon persons who so administered it without neces-

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sity. That would be perfectly intelligible. "The Bishop of Worcester said that indeed the words were doubtful, and might be pressed to that meaning;" that is, giving permission to women and lay persons to baptize; "but yet it seemed by the contrary practice of our church (censuring women in this case) that the compilers of the book did not so intend them, and yet propounded them ambiguously, because otherwise perhaps the book would not have then passed in the Parliament." Dean Barlow adds, "And for the conjecture, as I remember, he cited the testimony of my Lord Archbishop of York," that is, Hutton, who was Archbishop of York at that time; and there is a letter inserted in this Book of Conferences to the effect which is here stated, that he was informed by some of the reformers that they had left those words so ambiguously, in order to prevent any successful opposition being made to the passing of the act of Parliament. Whereunto the Bishop of London, "Bancroft," replied, "that those learned and reverend men who framed the Book of Common Prayer intended not by ambiguous termes to deceive any, but did indeed by those words intend a permission of private persons to baptize in case of necessity, whereof their letters were witnesses." So that he puts it upon that which is stated in the title, "Private Baptism in Houses in Cases of Necessity." Then he refers to some parts of those letters in order to show "that the same was agreeable to the practice of the ancient church; urging to that purpose both Acts ii., where three thousand were baptized in one day, which for the Apostles alone to do was impossible, at least improbable, and also the authority

of Tertullian and St. Ambrose, and the fourth to the Ephesians," which I mentioned before, "plain in that point, laying also open the absurdities and impieties of their opinion, who think there is no necessity of baptism; which word 'necessity' he so pressed, not as if God without baptism could not save the child, but the case put, that the state of the infant, dying unbaptized, being uncertain and to God only known; but if it die baptized, there is an evident assurance that it is saved:" and then he continues, "who is he that having any religion in him would not speedily, by any means, procure his child to be baptized, and rather ground his action upon Christ's promise, than his omission thereof upon God's secret judgment."

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"His Majesty replied first to that place of the Acts of the Apostles, that it was an act extraordinary, neither is it sound reasoning from things done before a church be settled and grounded, unto those which are to be performed in a church stablished and flourishing; that he also maintained the necessity of baptism, and always thought that the place of St. John to which he referred, '*nisi quis renatus fuerit ex aqua,*' &c., was meant of the Sacrament of Baptism, and that he had so defended it against some ministers in Scotland. 'And it may seem strange to you, my Lords,' saith his Majesty, 'that I who now think you in England give too much to baptism, did, fourteen months ago, in Scotland, argue with my Divines there for ascribing too little to that Holy Sacrament.'"

Then he refers to that which it is not necessary to read; a conversation between himself and "a pert minister," as the King describes him, with

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respect to the extent to which baptism was necessary. Then after that it is stated: "But this necessity of baptism his Majesty so expounded, that it was necessary to be had where it might be lawfully had, *id est*, ministered by lawful ministers, by whom alone, and by no private person, he thought it might not in any case be administered, and yet utterly disliked all rebaptization, although either women or laikes had baptized."

So that the opinion of the king was, that though he disliked the administration of baptism by any but by lawful ministers, and thought private persons ought not in any case to be permitted to administer it, yet notwithstanding all this, if there had been a *de facto* baptism, he disliked all rebaptization, although women or laics had baptized. That is the expression he makes use of. In other words, as Lyndwood expresses it in his Commentary, which I have already referred to, "*quod sic baptizatus non debet rebaptizari.*"

The King having expressed this opinion, "the Bishop of Winchester spake very learnedly and earnestly in that point, affirming that the denying of private persons, in cases of necessity, to baptize, were to cross all antiquity, seeing that it had been the ancient and common practice of the church, when ministers at such times could not be got, and that it was also a rule agreed upon among divines, that the minister is not of the essence of the Sacrament," as Lyndwood expresses it in one of the glosses to which I have already adverted. "*Bonitas aut sanctitas ministri non est de necessitate baptismi, sed de congruentia.*" "The King answered: 'Though the minister be not of the essence of the Sacrament,

yet is he of the essence of the right and lawful ministry of the Sacrament.'” But still his Majesty adhered to this opinion, that though he disliked the administration of it by any but a lawful minister, yet he utterly disliked all rebaptization, and therefore affirmed that the baptism was good and effectual, at least to a certain extent.

The result, as I have already stated from Dr. Montague’s letter, was the insertion of the words “lawful minister” in the rubric; so that whereas in the former rubric it had been “one of them that be present,” it was to be altered that a lawful minister was to call upon God for his grace, and a lawful minister was to administer the Sacrament; that was the utmost extent to which the King could prevail upon the bishops to agree. They would not agree to abolish altogether the administration of the Sacrament by laymen or by women; but they consented to insert, which must therefore necessarily have been as a measure of order and of regularity only, the words “lawful minister,” he being the proper administrator of the Sacrament, but not essential to its validity. The result of this long debate being, that the seeming or actual sanction given by the rubric of Edward VI. to private baptism by laymen, should for the future be omitted.

It is quite clear, I think, that the discussion must have been upon the propriety of distinctly and expressly prohibiting lay baptism, if not of declaring it absolutely null and void. Otherwise, what was there for the bishops to “stick at.” They did not “stick so much” at the insertion of the words “lawful minister;” therefore they must have

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“stuck at” something else; and, from the very nature of the discussion, the question must have been whether or not lay baptism was to be peremptorily prohibited, or perhaps even pronounced and declared null and invalid to all intents and purposes. But, the utmost extent to which the king could prevail upon the bishops to go, was to insert the words “lawful minister” where the words “one of them that be present” had been previously inserted.

I think the result of this conference at Hampton Court is not that which is alleged by Mr. Escott in his allegation, namely, that from that period to the present day, that is, from 1603, the Liturgy of the Church of England has not allowed the rite of baptism, performed by unordained persons, to be valid, but has held the direct contrary. It appears to me, that though the persons engaged in that conference did all that they could to discourage the administration of baptism by laymen and by women, yet that they could not prevail upon themselves absolutely and expressly to prohibit, still less to declare such baptism altogether null and void.

The Liturgy and rubric were afterwards altered according to the decision of the King and of the bishops at that time, and the King, by a proclamation which he issued very shortly afterwards, which is found in page 225 of the same book, recited generally what had taken place at Hampton Court upon the occasion of those conferences, the result of which he states in the proclamation to have been, that he thought no alteration necessary; that he thought “that some small things might rather be explained than changed; not that the same might not have been very well borne with by men who

would have made a reasonable construction of them." This, certainly, is not the language which would have been used if so great an alteration as that which is contended for, had been contemplated in the ritual of the church, as to the mode of administering baptism in private houses. Could he have said, "that some small things might rather be explained than changed," if the whole system or practice of twelve or thirteen hundred years was to be entirely swept away, and, contrary to that system and practice, the administration of baptism expressly confined to the lawful minister; and if not so administered, that the ceremony was to be altogether invalid.

The language employed, to say the least of it, must be considered as extremely ambiguous; and I cannot understand, if the King and the bishops had been at that time of opinion that lay baptism was invalid, why they should have scrupled to express their opinion upon the point as plainly as was done in the Articles of 1562, with respect to the doctrine of purgatory, of pardons, of the worshipping and adoration of images and relics, and the invocation of saints, and with respect to the number of the Sacraments, and many other corruptions of the Church of Rome, from which the Church of England was at that time purged. This point was of equal importance with those; and one upon which, with reference to the comfort of the people, it was absolutely necessary to have spoken plainly, in order that all doubts might be removed from the minds of the king's subjects, as to the sufficiency or insufficiency of baptism administered by any other than a lawful minister. It never could have been

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intended by those who attended this conference for the purpose of determining this very important point, to have left the matter still in doubt and ambiguity, if they had been clearly and decidedly of opinion that a baptism administered by laymen was altogether null and invalid.

Under these circumstances the Court is, I think, warranted in saying, that up to this time the church had not pronounced, and at this time did not pronounce, by any express act or declaration, lay baptism to be invalid, and that if the law at the present be, that lay baptism is invalid, it must have grown out of some subsequent alteration. Undoubtedly at this time the inclination of the church was to discourage lay baptism to the utmost extent; but I cannot think it is to be inferred, that the King or the bishops were of opinion that it was invalid. Indeed, the more important they thought it to discourage it, the more it would be incumbent upon the church to declare, in express and positive terms, its opinion that it was invalid, if they had arrived at any such opinion.

The practice does not appear, after this period, to have ceased, because we find an objection to the practice formed part of the representations made by the Presbyterians to the crown at the time of the Restoration. Indeed, it is quite clear, that at the time of the Restoration, and for the last ten or twelve years at least before that period, there could have been no public administration of the Sacrament of Baptism by lawful ministers.

That which took place at the time of the Restoration was undoubtedly of very considerable importance, because those alterations which had, pre-

vious to that time, stood on the sole authority of the King, not as an act of convocation (for it was only the King and a certain number of the bishops who had been assembled for the purpose of discussing these points), became then the law of the land, inasmuch as the Liturgy and rubric of 1661 was not only adopted and subscribed by the clergy of both houses of convocation and of both provinces, but was confirmed by an act of Parliament passed in the 13th and 14th years of the reign of Charles II. The alteration determined upon by James I. and the bishops could not repeal the Act of Uniformity by which the rubrics and Prayer Books of Edward VI. had been confirmed; and therefore, up to this time, those Prayer Books were in point of fact the only legal form to be observed as to the several services which were contained in those books. The alteration made by James I. had not the authority of law, though it might be submitted to for convenience, and because it was thought that the alterations which were made in those instances which I have mentioned, were right and proper to be made.

But at the time of the Restoration in 1661, certain other alterations were made in the Book of Common Prayer. We all know that various conferences were held at the Savoy, for the purpose of endeavouring to reconcile the objections of certain divines to the Book of Common Prayer. Certain of the bishops and certain of the leaders of the Presbyterians met for the purpose of seeing whether they could not agree upon such alterations as would be satisfactory to both parties; but in consequence of the extent of the demands made by the Presbyterians, which, if agreed to, would have required

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not an alteration only, but an entirely new modelling of the Liturgy, those conferences became ineffectual for their purpose, and were accordingly broken off. The two houses of convocation, however, proceeded to the revision of the Prayer Book, and the book so revised was approved by the King, and afterwards by the two houses of Parliament, and as I have already stated, was confirmed by the statute of the 13th and 14th of Charles II. From this time, from the year 1661, little or no alteration has been made in it. In substance it remains as at that time. The rubrics form a part of the statute law, to which every person, both clerical and laic, is bound to conform, except so far as in any particular case special exemptions have been introduced by subsequent statutes.

Now the important part of the rubric to be considered at this time is that which is prefixed to the Service for the Burial of the Dead, because by that rubric, for the first time, it is declared that persons who die unbaptized are not to have that service read over them. It may be here observed, however, that though the word "unbaptized" was then inserted for the first time in the rubrics of the church, yet the old law equally prohibited the interment with the prayers of the church, of those who had died unbaptized by their own fault. Some difference was made, as we know by reference to writers upon the subject, and as a matter of history, between those who died wilfully unbaptized, and those who died so by unavoidable misfortune or accident. But it is stated in this rubric, that the Burial Service is not to be used over persons who die "unbaptized;" and the question to be con-

sidered is, whether this word “unbaptized,” with reference to this rubric, bears any interpretation different from that which it bore in the ancient canon law, or which was given to the term “not baptized” in the former rubrics.

In its usual and general sense, the word “unbaptized” would only apply to persons to whom the Sacrament had not been administered at all, without respect to the person by whom it was administered. But it has been contended, that at this time the church and the legislature must have used the word in a more restricted and narrow sense, namely, that they must have intended to apply it to persons who had not been baptized by a person who, according to the rubric for baptism, was alone authorized and commissioned to administer baptism, namely, a lawful minister; and that is contended to have meant in 1661, and at the present time to mean, a minister episcopally ordained, so that the expression “lawful minister,” as used in the rubric of 1661, would bear a different interpretation from that which must have applied to it in the reign of James I., because in the year 1661, the preface to the Ordination Service, which is also confirmed by act of Parliament, directed that no person should be taken or accounted to be a lawful bishop, priest, or deacon in the Church of England, or suffered to execute any of the said functions, who was not in holy orders, or had not been previously called, tried, examined, and admitted thereunto according to the form hereafter following, or hath had formerly episcopal ordination. Whereas down to that time, a person who had been admitted bishop, priest, or deacon by competent authority, (not ne-

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cessarily implying by these words episcopal authority,) was permitted to continue to exercise his functions, and consequently his administration of the Sacrament was good and valid, and persons baptized by him were considered as members of the Christian Church. The alteration, however, made by the preface to the Ordination Service in 1661, disentitles any person to the appellation of "lawful minister," within the meaning of the rubric, who had not obtained episcopal ordination, not necessarily by a bishop of this realm; for the practice has been and still is to admit and receive into the Church of England, and to permit to exercise spiritual functions in the Church of England, those who have received ordination at the hands of foreign bishops, particularly Roman Catholic bishops—and this without conferring fresh orders, but only upon a renunciation of the errors of the church to which they had previously belonged.

The act of Parliament of 1661, therefore, makes it necessary that a person shall be episcopally ordained in order to be a bishop, priest, or deacon of the Church of England, or to hold any preferment in the Church of England. But supposing that a Presbyterian should present himself for ordination to the bishop, and if upon examination he was found duly qualified for office in the church, I apprehend that there would be no difficulty whatever in admitting that person to holy orders, and ordaining him, without his being rebaptized. Supposing that a Presbyterian, having been baptized in his own country by a Presbyterian minister, had come to this country, and had presented himself for ordination, it would not be requisite either before

he was admitted into communion with the church, or before he was ordained a minister, that he should be rebaptized. And therefore, although in using the words “lawful minister” in the baptismal service, the law intended a person who was a lawful minister according to the law of England, that is, since 1661, an episcopally ordained minister, it does not follow that acts performed by persons who were not so ordained are invalid. I apprehend that no question would arise as to the validity of a baptism performed by a Presbyterian minister, for the purpose of enabling a person so baptized to receive orders.

Bishop Fleetwood argues very strongly upon this point in his work “*Judgment of the Church of England on Lay and Dissenting Baptism.*” In (page 554,) speaking of lay baptism, he says, “For the first fifty years after the Reformation the Church of England allowed of baptism performed by neither bishop, priest, or deacon, and declared that a child so baptized was fully and sufficiently baptized, and ought not to be baptized again.” That is, with reference to the rubric of Edward the Sixth. And then he says, secondly, “The Church of England in the next fifty years, that is, from James the First to Charles the Second, did call for a lawful minister to baptize children, but she did not say all that while that all they who were not episcopally ordained were not lawful ministers, for she admitted and instituted into her parish cures such as had not been episcopally ordained, and consequently admitted their baptism to be good and valid. Thirdly, it is not a due nor just, much less a necessary consequence, that because the Church of England calls

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for a lawful minister to baptize, and calls none but such as have been episcopally ordained a lawful minister, she should therefore appoint no baptism valid but such as is administered by an episcopal hand." And then he proceeds to show that "if such were the interpretation put upon the rubric, it would exclude all administration of the rite of baptism by Presbyters of France, Germany, Scotland, and Holland, whose acts, however, they say, would not be sanctioned or allowed here, that is, by the law of the church."

He goes on to say: "The Church of England will have none but episcopally ordained ministers to baptize in England." But does "she thereby disannul (in her judgment and opinion) the baptisms of all those countries that are administered by Presbyters? Was it ever understood that if a French, Helvetic, German, Scottish, or Dutch Presbyterian should desire to communicate with the Church of England, he was to be first baptized? If he desire to be a clergyman, and hold a benefice or obtain a dignity in the Church of England, he must indeed be ordained according to the English form, or by some episcopal hand elsewhere, for that has been the law since 1661; and no one can since that time be accounted a lawful minister but such a one. But does it follow from thence that all the children they had formerly baptized were not Christians? For that is in fact the question. Will it be contended that those who are not baptized by a lawfully ordained minister are not Christians? This is indeed a consequence made by those rebaptists, but this consequence is not made by the law of England."

He then proceeds to show that many foreign

Protestants, and several Dissenting ministers at home, had been ordained without having been baptized anew; and he argues from thence that they must have been considered Christians though baptized by Presbyterian hands, otherwise they would not have been ordained. "For when was it heard," he says, "either of old or late, that a man could be ordained a priest who had not been baptized?"

Therefore he shows most clearly and conclusively that baptisms by Presbyterians, by persons who were not of episcopalian ordination, nevertheless were good and valid baptisms, though a Presbyterian could not be considered as a lawful minister under the rubric of 1661. The whole of the work of this very learned prelate is extremely worth perusal and study. It embraces the whole of the arguments both for and against lay baptism, as sanctioned by the Church of England; not, indeed, as to its abstract validity or invalidity, but entirely confining himself, as he expressly states, to an inquiry into the judgment of the Church of England upon it.

But as I have stated, this rubric as to private baptism was at that time altered, and if the administration of baptism was thenceforth to be strictly confined to a lawful minister, that is, an episcopally ordained minister, then no baptism could be valid without the intervention of an episcopally ordained minister; and none of the privileges consequent upon valid baptism would be imparted to those who had been baptized by any other than a lawful minister.

But if this were so, it is extraordinary that the only instance which can be found of a proceeding with respect to the refusal to inter a child or person

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baptized by a Dissenting minister, or by any person other than a lawful minister, is the case of *Kemp v. Wickes*, in 1809. I pass by that case which was mentioned as arising at Daventry, which in fact has not any bearing upon this part of the case, because when that case came to be examined, it appeared that a criminal information had been moved for against the clergyman of Daventry for refusing to admit to interment the body of an Anabaptist. In the first instance, upon affidavit stating that interment had been refused in the churchyard, a rule *nisi* for a criminal information was granted by the Court, but when it came to be explained that what he had refused to do was not to permit the body to come into the church, or to be interred in the churchyard, but to read the service over the body, because he was not satisfied that the person had been baptized, that rule was dismissed. It was dismissed without costs; because, as I apprehend, it appeared that through inadvertence the gate of the churchyard through which the body was to be carried had been locked, and, therefore, there was not access had to the churchyard for the purpose of that common law right which could be enforced by application to a Court of Common Law. I apprehend that is the whole of that case. A rule for a criminal information was in the first instance granted, and afterwards dismissed upon the ground that it was only the performance of the burial service over the body that was refused, and not the interment in the churchyard; and the doctrine laid down in that case, was, that the common law right of interment in the churchyard belonged to every parishioner, and

that could be enforced in a Court of Common Law, but that the manner in which the service was to be performed was to be left to the Spiritual Court, and there to be enforced.

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I have said that it seems to me extraordinary that the case of *Kemp v. Wickes* is the first case that appears upon the records of this Court that I am aware of, and the only case that has occurred with the exception of that which took place at Gloucester, at about the same period, or rather antecedently to the decision of the case of *Kemp v. Wickes*; and which, upon the explanation which was given of it on the second day's argument by Dr. *Nicholl*, turned out to be no precedent at all, or rather something worse than a precedent, looking at the nature of the proceedings in that case. The case, therefore, of *Kemp v. Wickes* is the only case which has occurred in which the question has been raised as to the right of interment of persons baptized by any other than an episcopally ordained minister. This I say is somewhat extraordinary, considering that the construction contended for is, that since the year 1661 no person could be validly baptized by any but an episcopally ordained minister. Yet such is the fact. We do not find from historical writers, that any of the bishops, at their visitations held after the Restoration, either refused to confirm persons who had been baptized, (as many must have been from the year 1648 to 1660,) by persons who were not episcopally ordained, or that they impressed upon the clergy the necessity of rebaptizing them. This is in substance the argument used by Bishop Fleetwood in his work. For it must be apparent to every body who has

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heard this case discussed, that we are all drawing our information from the same sources—the writings of those who have discussed this subject at great length, and with great acuteness and ingenuity. We do not find that the bishops in their visitation charges impressed upon their clergy the necessity of rebaptizing those who had received baptism from unauthorized hands. Nothing of the kind appears, nor does it appear that those persons who had been so baptized were excluded from the Sacrament of the Lord's Supper, or that the clergy were advised that they should not admit such persons to Christian burial, as a lawful minister was the only person who could validly baptize, and as the rubric had expressly declared that the service was not to be read over those persons who had died unbaptized.

The absence of all allusion to these circumstances shows that in the opinion of those by whom the law was framed, it was not intended to include within the term “unbaptized” those who had been baptized with water, in the name of the Father, and of the Son, and of the Holy Ghost, though not by a lawful minister, which from 1661 meant a minister who had received ordination from episcopal hands. In fact, the practice continued: it was irregular, undoubtedly, but not null and void.

Nothing can show this more clearly than that which took place at the beginning of the last century, in the year 1712, which led to certain conferences at Lambeth upon the subject—the last epoch before the case of *Kemp v. Wickes* upon which any very great discussion arose with respect to the validity or invalidity of lay baptism; and it was about that time that all those writers who had

espoused one side or other of the subject, ushered their productions into the world.

Bishop Burnet, in his *History of his Own Times*, says, "Another conceit was taken up of the invalidity of lay baptism," (he is now writing of the period of 1712), "on which several books have been written: nor was the dispute a trifling one, since by this notion the teachers amongst the Dissenters passing for laymen, said this went to rebaptizing them and their congregation." He says, Dodwell gave rise to this conceit. He was a very learned man and led a strict life—he seemed to hunt after paradoxes in all his writings, and broached not a few. He thought none could be saved but those who by the Sacraments had a federal right to it, and that those were the seals of the covenant—so that he left all who died without the Sacraments to the uncovenanted mercies of God, and to this added, that none had a right to give the Sacraments but those who were commissioned to it, and these were the apostles, and after them the bishops and priests ordained by them. It followed upon this, that Sacraments administered by others were of no value."

He then goes on to state, "This strange and precarious system was in great credit among us, and the necessity of the Sacrament, and the invalidity of ecclesiastical functions when performed by persons who were not episcopally ordained, were entertained by many with great applause." He says, "This made the Dissenters pass for no Christians, and put all thoughts of reconciling them to us far out of view; and several bitter books were spread about the nation to prove the necessity of rebaptizing them, and that they were in a state

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of damnation till that was done. But few were by these arguments prevailed upon to be rebaptized. This struck even at the baptism by midwives in the Church of Rome, which was practised and connived at here in England till it was objected to at the conference held at Hampton Court soon after James the First's accession to the crown, and baptism was not till then limited to persons in orders." He says, "Nothing of this kind was so much as mentioned in the year 1660, when a great part of the nation had been baptized by Dissenters." That is, that lay baptism was invalid, and that parties so baptized were not entitled to be considered as Christians. "But it was now," he says, "promoted with much heat. The bishops thought it necessary to put a stop to this new and extravagant doctrine; so a declaration was agreed to, first against the irregularity of all baptisms by persons who were not in holy orders, but that yet according to the practice of the primitive Church, and the constant usage of the Church of England, no baptism (in or with water in the name of the Father, Son, and Holy Ghost) ought to be reiterated."

Then Burnet goes on to state that which perhaps is not quite strictly correct, but his statement is rectified in the life of the prelate to whom I am about to refer, which was written by his son, and corrected, as he states, from papers in the handwriting of his father. Burnet says, "The Archbishop of York at first agreed to this; so it was resolved to publish it in the name of all the bishops of England: but he was prevailed on to change his mind, and refused to sign it, pretending that

it would encourage irregular baptism ; so the Archbishop of Canterbury, with most of the bishops of his province, signed it, and resolved to offer it to the convocation. It was agreed to in the Upper House—the Bishop of Rochester only dissenting. But when it was sent to the Lower House, they would not so much as take it into consideration, but laid it aside, thinking it would encourage those who struck at the dignity of the priesthood.” He says, “ This is all that passed in convocation.”

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In the “ *Life of Archbishop Sharp*,” published by his son, a somewhat different version of the story is given. But the facts are substantially the same. The ground of rejection of the declaration appears to be the same according to both accounts,—namely, that there was a danger of encouraging dissenting baptisms, by publishing a declaration of the bishops of the Church. So that instead of being issued as a declaration of all the bishops of both provinces, it was confined to the province of Canterbury, signed by the archbishop and most of the bishops of his province, and was agreed to in the Upper House of convocation, the Bishop of Rochester only dissenting ; and it declared, that though baptism by persons not episcopally ordained was irregular, yet according to the practice of the primitive Church it was valid.

In the account given in “ *Archbishop Sharp’s Life*,” from papers in his son’s possession, and which, therefore, in addition to being published by his son, may be supposed to be correct, he says,—“ Tuesday, April 22nd, at eleven o’clock, I went to Lambeth. We were in all thirteen bishops. We had a long discourse about lay baptism, which

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of late hath made such a noise about the town." So that it is clear that at this time lay baptism was practised, though not considered regular. "We all agreed that baptism by any other person except lawful ministers, ought, as much as may be, to be discouraged." This is in 1712. The rubric had been confirmed by act of Parliament in 1661, to the effect that lawful ministers were the persons by whom baptisms ought to be administered. "We all agreed that baptism by any other person except lawful ministers ought, as much as may be, to be discouraged, nevertheless, whoever was baptized by any other person, and in that baptism the essentials of baptism were preserved, that is, being dipped or sprinkled in the name of the Father, &c., such baptism was valid and ought not to be repeated." That is the declaration of the Archbishop of York, of what was the opinion of all the bishops at that time in town: that lay baptism in the name of the Father, and of the Son, and of the Holy Ghost, was valid, and ought not to be repeated.

His son, Archdeacon Sharp, goes on to say, "This indeed is the sense of the Church of England, as will appear to any person who considers the rubrics in the office for private baptism, and compares them with one another, and with the previous questions in the office itself. From all which laid together, it may be plainly collected that where the essentials, matter and form, have been preserved, though administered by another hand than that of a lawful minister, the baptism shall not be so much as hypothetically repeated; yet nevertheless it is so far condemned and dis-

approved, as irregular and uncanonical, that the child or person so baptized shall not be received into the congregation. But the officiating minister must have recourse to the directions of his ordinary, as in other irregular, and uncommon, and difficult cases. But as our Church hath nowhere openly and expressly declared for the validity of lay baptism, or allowed it to be administered by laymen, in any case, how extraordinary soever, some handle is left for disputing or speaking doubtfully about her sense of the matter. Therefore, his grace of Canterbury, finding so many bishops unanimous in their opinion, that it would be of public service if they all joined in publishing a declaration of their sentiments, which would appear as a kind of decision of the point, and might help to make the minds of some men more easy, at least to shorten the disputes then raised upon this question."

He then inserts a letter of the Archbishop of Canterbury to the Archbishop of York, to this effect: "In pursuance of the agreement made hereby your grace and the rest of my brethren the bishops, when I had the favour of your good companies on Easter Tuesday, I met yesterday with some of them, and we drew up a paper suitable (as we judge) to the proposal then made. It is short and plain, and I hope inoffensive, and for a beginning, as I humbly conceive, full enough. I here enclose a copy of it for the perusal of your grace, and of as many others as your grace shall think fit to show it to." He says, "I send this declaration unsigned, because we who were present, desired first to have the opinions of your

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grace and others who were absent, and should be glad to know whether you would have anything added to it, or altered in it, for we affect not the vanity of dogmatizing."

Now the declaration is to this effect, "Forasmuch as sundry persons have of late, by their preaching, writing, and discourses, possessed the minds of many people with doubts and scruples about the validity of their baptism, to their great trouble and disquiet, we the archbishops and bishops, whose names are underwritten, have thought it expedient on us to declare our several opinions, in conformity with the judgments and practice of the Catholic Church, and of the Church of England in particular, that such persons as have been already baptized in or with water, in the name of the Father, Son, and Holy Ghost, ought not to be baptized again. And to prevent any such practice in our respective dioceses, we do require our several clergy, that they presume not to baptize any adult person whatsoever, without giving us timely notice of the same, as the rubric requires."

This declaration, drawn up and issuing from the bishops, directly shows that in the opinion of all those persons, the law of England and of the English Church remained as it was before the Reformation—as it was during the time of Edward VI.,—as it was from the time of James I. to the Restoration;—namely, that baptism administered with water in the name of the Trinity, though by a lay person, was nevertheless good and valid, and ought not to be repeated. It affords, I say, a strong indication of the opinion of persons who lived at

this period of time, and who were acquainted with the law and the practice of the church at that time.

Now the Archbishop of York in reply writes in these terms: "I had the honour of your grace's letter (with the declaration inclosed) the last night. I am entirely of the same sentiments that we all declared we were, when we had the honour to dine with your grace the last week. But yet, for all that, I can by no means come into the proposal your grace has now made in your letter; in that we should all *declare* (which is printed in italics) under our hands the validity of lay baptism." He had agreed with the others as to the validity of lay baptism, and there is no alteration in the archbishop's opinion as to the validity of lay baptism; but he doubted the expediency of declaring such an opinion. He says, "I can by no means come into the proposal your grace has now made in your letter, in that we should declare under our hands the validity of lay baptism"—for this reason, "for I am afraid this would be too great an encouragement to the Dissenters to go on in their way of irregular uncanonical baptisms. I have, as your grace desired me, communicated this matter to three of our brethren, the Bishops of Chester, Exeter, and St. David's, and we have had a full discourse about it, and we are all of the same opinion that I now represent."

And then the son of the archbishop states the reason why he had thus given this at length. He says, "The account of this matter is the more fully set down here, because Bishop Burnet has not represented it in a favourable light with respect to

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Archbishop Sharp." And then he gives the account I have already read from Burnet.

This, therefore, is beyond all doubt, that up to 1712 the opinion of the Church of England was, that lay baptism was valid—that it was not to be repeated—and that a person who had been baptized by a layman was not a person unbaptized; and up to this time there had been no notion that a person so baptized was not entitled to the rites of Christian burial. Indeed, the very first time, as was pointed out in the argument by one of the learned counsel, at which any notion of this kind seems to have been entertained, or even to have been hinted at, is by Bishop Fleetwood, who, in summing up his argument, amongst other things says, that he never would believe that the Church of England did not hold the validity of lay baptism, though irregular, until the bishops should order their clergy, both by preaching, writing, and discoursing, to tell their congregation that unless they have been baptized by episcopal hands they are not Christians; they must not come to the blessed Sacrament; they ought not to be married by the appointed form which supposes both parties to be Christians; nor can they, nor ought they, to have Christian burial; the rubric (confirmed by act of Parliament and convocation) expressly excluding unbaptized persons. Here is the first time at which any suggestion seems to have been made by any of the writers whom I have been able to consult upon this occasion, that one of the consequences of the denial of the validity of lay baptism would be the exclusion of persons so baptized from Christian burial.

Now, I say, that at this time it is quite clear that the opinion of the church was, that lay baptism was valid. I do not say, nor am I called upon to say, whether in my opinion that which was maintained by all the bishops present at Lambeth in 1712 is well founded or not. Whether baptism administered by laymen is abstractedly good and valid according to the intention of the Divine founder of the Sacrament, or not, is not the question for me. The question for me to determine is, what has the Church of England said upon the subject? Nothing can be more clear, from the whole history of the church, from its very early ages, or at least from the time when St. Augustine flourished in the fourth and fifth centuries, down to the time of the Reformation, and from that time down to the year 1712, than that the baptism of persons who were baptized according to the proper form by any person other than a lawful minister was considered to be a valid and sufficient baptism; and if it was valid and sufficient at that time, it is equally valid and sufficient now; for no alteration whatever has taken place in the rubric since that time. Nothing can be more clear than the view which the Church of England has taken upon the subject. It is very true that a great number of writers, men who have argued the question with great ability, with great ingenuity and great learning, have espoused different opinions upon this subject; and the references to authors of that description would be endless if the Court were inclined to enter into the question at all.

Bishop Van Mildert, in his life of *Waterland*, expresses himself in these terms:—"The truth"

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(as to the validity or invalidity of lay baptism) “to be established must primarily depend upon its agreement with the word of God, and the concurrent practice of the primitive church. On a point not absolutely of fundamental importance, to espouse on the one side the opinions of such men as Lawrence,” (who was the author of the *Invalidity of Lay Baptism*,)—“the opinions of such men as Lawrence, Brett, Leslie, and Waterland; or on the other, those of such opponents as Bingham, Burnet, Kennet, and Kelsall,” (and to these may be added most unquestionably Bishop Fleetwood,) can hardly be deemed discreditable to either party. We know that great and good men have differed, and still differ, from each other on this point, without any diminution of mutual respect, or any intentional deviation from the doctrine or discipline of the church.”

Many authorities have been cited in the argument, and the Court has thought it its bounden duty to look into and examine the authorities so cited, and other parts of the writings of those authorities, for the purpose of seeing whether they do or do not differ in other parts of their works from that which is stated to be their opinion in the passages cited, and I find them strongly adhering to the opinions they had originally formed upon the subject.

Waterland however, is an exception to this, for he having originally espoused the doctrine of the validity of lay baptism, was afterwards converted to the opposite doctrine, and strongly and most ably and learnedly contended that lay baptism was invalid. He states, in the tenth volume of the edition of his works by the Bishop of Durham, in

a letter written in the year 1713, (for all these books were written about this period of time when this conceit of Dodwell is stated to have been put forth), "I am not at all surprised at Mr. Kelsall," (who was in favour of the validity of lay baptism)—
 "I am not at all surprised at Mr. Kelsall's judgment on the case. It is not very long since I was myself of the same opinion, being led to it, as I suppose he may, partly by the good nature of it, and partly by the authority of great names, as the Bishops of Sarum and Oxford, &c.; besides some passages of antiquity not well understood, and I was pleased, I confess, to see all as I thought confirmed by Mr. Bingham's *Scholastical History of Lay Baptism*. But second thoughts and further views have given a turn to my judgment, and robbed me of a pleasing error, as I must now call it, which I was much inclined to embrace for a truth, and could yet wish that it were so."

So that Waterland was in the first instance in favour of the validity of lay baptism, but was afterwards converted, as it appears from other parts of his works, by the writings of Mr. Lawrence. Mr. Lawrence, it appears, was a layman in the city of London who had been baptized by a Dissenting minister; he was dissatisfied in his own mind as to the validity of lay baptism, and he procured himself to be rebaptized by a curate of one of the parishes in London, and upon that occasion he wrote a very learned book, on the subject of the validity or invalidity of lay baptism, and discussed it with great ingenuity, with great learning, and with great ability. But his book, though extremely strong in argument against the validity of lay bap-

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tism, does not go directly to ascertain the view which had been taken of it by the Church of England. The argument of Lawrence, and the argument of Waterland after he came round to the opinion espoused by Lawrence, is against the abstract validity of it, that is, that it was invalid, as inconsistent with the intention of the Founder. They do not attempt either the one or the other, except in a very few passages, to deny that the Church of England had practised it, and that it was the practice of the church. On the contrary, Waterland expressly states, though he is of opinion that lay baptism is invalid, that the practice of the Church of England and the stream of her divines are directly against him. Though upon second thoughts (sincere as he was in his latter opinions, as from every part of his works it is clear), he regarded the practice as invalid, yet nevertheless he admits that the Church of England had adopted a different opinion with respect to it.

The opinion of Bingham, as I have already stated, was strong that lay baptism was valid in the view of the Church of England, so was Mr. Kelsall, to whose letter Waterland is replying in part of the work to which I have been adverting. He states that the Church of Rome, ever since St. Austin, hath allowed not only laymen but even women, in cases of necessity, to baptize. And he states that he "can produce canons of that church requiring the curates to instruct their people in the form of baptizing, that where necessity should require, they might know how to do it aright," to which canons I have before adverted; "which practice was so exceeding frequent among them,

that it was morally impossible but that many of their clergy must be such as had in their infancy been so baptized." He also states, "that in some cases baptism by lay hands hath been permitted by the church, and in no case (if administered with water, in the name of the blessed Trinity) altogether disannulled, so as that the receiver should be baptized anew. Most writers on both sides of the question allow this to have been the case ever since St. Austin, at least in the Western Church. And if we derive our Sacraments, as we do the succession of our priesthood, through the corrupted channels of the Church of Rome, then I am very much afraid that an invalidity proved in the first, will infer an invalidity in the latter too."

Bishop Fleetwood also, as I have already stated, expressed himself strongly in favour of the validity of lay baptism, according to the doctrine of the Church of England. It is unnecessary to refer more fully to him than I have already done, for the purpose of showing that his opinion was, that although the Church of England considered lay baptism to be irregular—though the bishops were to inquire after it in their visitations, and to censure the persons who had usurped the office of priest without authority, and subject them to punishment, yet nevertheless the baptism was good, and ought not on any account to be repeated.

I will not therefore travel further into the authorities which have been cited upon this subject, with the exception of one upon whom great stress was laid in the course of the argument, and that is Wheatley upon the Common Prayer. He does certainly very strongly express his opinion as to the

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invalidity of that rite, when administered by laymen, in the chapter "Of the Order for the Burial of the Dead," the first section "Of the First Rubric." "Whether this office is to be used over such as have been baptized by the Dissenters or Sectaries, who have no regular commission for the administering of the Sacraments, has been a subject of dispute, people generally determining on one side or the other according to their different sentiments, of the validity or invalidity of such disputed baptisms. But I think that for determining the question before us, there is no occasion to enter into the merits of that cause, for whether the baptisms among the Dissenters be valid or not, I do not apprehend that it lies upon us to take notice of any baptisms, except they are to be proved by the registers of the church."

This will carry the doctrine a great deal too far, because it would apply to a great number of persons who, from misfortune in regard to their baptisms, had not been registered. And such an argument, therefore, detracts to a certain extent from his authority.

But Wheatley differs from other writers—from Nicholls, from Shepherd, and from Cosin, the Bishop of Durham.

The question, therefore, comes to this, as far as I have hitherto gone, namely, whether, as far as we can rely on the authority of persons not entitled to lay down or to enact the law, but deserving of great attention as persons of great learning, piety, and ability, there is not sufficient to show,—notwithstanding all the writers on the other side of the question,—that the Church of England at least

has looked upon lay baptism as valid, for the purpose for which it is at present necessary to consider the question.

There is, however, one writer upon the subject whose opinions it is not improper that the Court should refer to, because he is universally looked up to as one of the most judicious writers in the church, and that is Hooker. Now Hooker was decidedly of opinion that lay baptism was valid. He says, in his Fifth Book, which was first published in 1597, (c. 62.) “Hence the Church of God hath always hitherto constantly maintained, that to rebaptize them which are known to have received true baptism is unlawful. If, therefore, at any time it come to pass that in teaching publicly or privately, in delivering this blessed Sacrament of regeneration, some unsanctified hand, contrary to Christ’s supposed ordinance, do intrude itself, to execute that whereunto the laws of God and his Church hath deputed others; which of these two opinions seemeth more agreeable with equity, ours (of the Church of England) that disallow what is done amiss, yet make not the force of the word and Sacraments, much less their nature and very substance, to depend on the minister’s authority and calling, or else theirs (alluding to the Puritans) which defeat, disannul, and annihilate both, in respect of that one only personal defect, there not being any law of God which saith, that if the minister be incompetent, his word shall be no word, his baptism no baptism?” Again, “The grace of baptism cometh by donation from God alone. That God hath committed the ministry of baptism unto special men, it is for order’s sake in his

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Church, and not to the end that their authority might give being, or add force, to the Sacrament itself." He says, lastly, "Whereas general and full consent of the godly learned of all ages doth make for validity of baptism, yea albeit administered in private, and even by women; which kind of baptism, in case of necessity, divers reformed churches do both allow and defend; some others which do not defend, tolerate; few, in comparison, and they without any just cause, do utterly disannul and annihilate; surely, howsoever, through defects on either side, the Sacrament may be without fruit, as well in some cases to him which receiveth, as to him which giveth it; yet no disability on either part can so far make it frustrate and without effect, as to deprive it of the very nature of true baptism, having all things else which the ordinance of Christ requireth."

Nothing can more strongly show that this most learned and pious person, and most zealous supporter of the Church of England in his time, that is, at the time of Queen Elizabeth, notwithstanding that canon of 1575, (for this is twenty years afterwards,) held, that lay baptism was valid,—though it was irregular, though it was an intrusion upon the priest's office and subjected the party to punishment for such intrusion.

I will not proceed any further with the examination of the writers upon this subject, whose names I have already mentioned. The different authorities, from the time of Tertullian down to the time of the Reformation, and the acts of the church afterwards, to which most of these writers refer, necessarily lead to the conclusion, that though lay baptism

itself is irregular, the Church of England has always held it to be good and valid baptism, and by no means to be repeated.

The different parts of the baptismal service seem to confirm that conclusion. The rubrics of Edward VI., of James I., and of Charles II., have been already quoted. The rubrics of Edward VI. were to the effect that in the administration of baptism in private houses, a layman, "one of them that were present," was to perform the ceremony, and the baptism so administered was declared to be sufficient. The rubric of James I. mentions a lawful minister as the person by whom the rite was to be performed. The rubric of Charles II., which was confirmed by act of Parliament, directs that the minister of the parish (or in his absence any other lawful minister that can be procured), with them that are present, shall "call upon God and say the Lord's Prayer, and so many of the Collects appointed to be said before in the form of public baptism as the time and present exigence will suffer; and then the child being named by some one that is present, the minister shall pour water upon it, saying these words, 'I baptize thee,'" and so on; and in the rubrics both of James and Charles, instruction is given to the friends of the child, that they shall not doubt that the child is lawfully and sufficiently baptized, and ought not to be baptized again. The same expression is made use of in the rubrics of Edward VI., where a baptism of a child in a private house has been administered by a layman; and all the four rubrics contain a direction that the child shall be brought into the church, to the intent that the con-

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gregation may be satisfied that the child has been sufficiently and lawfully baptized.

Now the questions which are to be addressed to the persons who bring the child to the church differ in some respects. In the Liturgies of Edward VI. the questions addressed are six, they are as follows:—By whom was this child baptized? Who was present when this child was baptized? Whether they called upon God for his grace and succour in that necessity? With what thing and matter did they baptize the child? With what words was the child baptized? And whether they think the child was lawfully and perfectly baptized?

These were the questions, according to the rubrics of Edward the Sixth, which were addressed to the persons who brought the child to be received into the church, after it had received private baptism from the hands of a layman, and they followed each other in immediate succession without break or interruption. The rubric then proceeded,—“If the minister shall find by the answers of such as brought the child, that all things were done as they ought to be, then shall he not christen the child again,” but he shall certify that all has been well done and according to due order, concerning the baptizing of this child, and then he is to proceed in the form that is there pointed out.

Now, at the conclusion of the rubric of Edward the Sixth, we read,—“But if they which bring the infant to the church do make an uncertain answer to the priest’s questions, and say that they cannot tell what they thought, did, or said, in that great fear and trouble of mind; (as oftentimes it chanceth;) then let the priest baptize him in form.

above written concerning Public Baptism, saving that at the dipping of the child in the font, he shall use this form of words: ‘If thou be not baptized already, I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.’” That was the form to be observed, when it appeared that the persons, from trouble of mind at the time, could not answer certainly as to what had been done. That confirms the presumption that this private baptism was not expected to be administered by a person in holy orders, who could hardly be supposed to be in such trouble of mind as to be unable to state what passed at the time.

So the matter stood till the rubric of James the First. Then the questions were in some degree altered. The third question was omitted, and a most important variation took place with respect to the manner in which the questions were to be addressed to the parties. The two first questions in all the three rubrics were: “By whom was this child baptized?”—and, “Who was present when this child was baptized?” In the rubric of James the First, instead of the question,—“Whether they called upon God for his grace?”—This observation or caution, which appears to me most important in the consideration of this subject, is introduced before what were the fourth and fifth, and now are the third and fourth questions. “And because some things essential to this Sacrament may happen to be omitted, through fear or haste in such times of extremity, I therefore demand further of you,—‘With what matter was this child baptized? With what words was this child baptized?’” The question which was the sixth in Edward the

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Sixth's rubric became the fifth here, in the rubric of James, and is omitted in the present rubric,—
 “Whether they thought the child to be sufficiently baptized?”

The introduction of the observation that the matter and words are essential to the Sacrament, appears to me to exclude the notion that the minister was an essential part of the administration of the Sacrament. For if he was an essential part of the administration of the Sacrament, the observation would have been introduced at the commencement, before the first question was asked: “By whom was the child baptized?” And it would then have run thus: “Because some things essential to this Sacrament may happen to be omitted, therefore, I ask you, by whom was this child baptized?” But that observation as it now stands in the rubric, has no reference to the two questions that have gone before,—it is directly applied to those which follow: “With what matter was this child baptized?” and, “With what words was this child baptized?” Clearly, as it appears to me, showing that the matter and the words were the important parts of the Sacrament, and that the minister, though, for order and regularity's sake, he ought to be present at the time, and to administer the Sacrament, yet was not an essential part of it. The same observation occurs in the same place, and precedes and introduces the same two questions in the rubric of Charles II. An analogous alteration is made in the concluding rubric of the Liturgies of James I. and Charles II., and limits the conditional baptism to cases where “it cannot appear that the child unbaptized

with water, and in the name of the Father, and of the Son, and of the Holy Ghost," (which are essential parts of baptism,) for so the present rubric is worded.

All the other parts of the services which apply to it seem to confirm this view of the law. In the Church Catechism, for instance, it is asked how many Sacraments there are, and the answer is, "Two:" again, "How many parts are there in a Sacrament?" the answer is again, "Two, the outward and visible sign, and the inward and spiritual grace." Then comes the question, "What is the outward and visible sign or form in baptism?" to which the answer is, "Water, wherein the person is baptized, in the name of the Father, and of the Son, and of the Holy Ghost:" no mention being made of the minister as an essential part, and nothing even suggested as to his being an essential part of the Sacrament, which is complete when the child has been baptized according to the rubric of Edward VI., with water, in the name of the Father, and of the Son, and of the Holy Ghost. I am clearly, then, of opinion, that the church has not considered the minister as an essential part of the Sacrament of Baptism. It is very desirable that he should be present to administer it, and highly improper, excepting in cases of absolute necessity, that it should be administered by any other person, who, in so doing, usurps an office which does not belong to him; is meddling with things which are not within his vocation, and, therefore, is liable to censure and to punishment. But, nevertheless, the services of the Church of England, as well as all the acts and declarations

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of the church, when considered and compared to gether, appear to me perfectly consistent with each other in treating baptism administered in the name of the Father, and of the Son, and of the Holy Ghost, with water, as a sufficient administration of that Sacrament; and show that the Church of England is as strongly against the repetition of baptism as was the church in the early ages.

Something was said, in the course of the argument, with respect to the Articles of the Church; and Mr. Escott's Allegation in proof that the validity of baptism by laymen is inconsistent with them, refers to the twenty-third Article, which declares that—"It is not lawful for any man to take upon him the office of public preaching, or ministering the Sacraments in the congregation, before he be lawfully called, and sent, to execute the same."—And this is undoubtedly true; so that when a person does take upon himself the office of public preaching, (supposing that this Article against public preaching, or ministering the Sacraments in the congregation, can by possibility be intended to apply to the private administration of baptism in cases of necessity,) he is taking upon him the office of a minister, and, therefore, he is doing that which is not lawful, and is liable to punishment. But the Article does not go on to say, that if a person does so intrude himself, the act which he does shall be invalid. What is there in the services of the Church of England, in the rubrics, or in the spirit of the law, to show that an act done, though irregularly and improperly done, and though the person who does it is liable to punishment, is invalid, null and void?

Again, lay baptism is not more inconsistent with this Article at the present time than it was in the year 1552, when these Articles were originally framed, and yet it is admitted by the defendant that baptism by a layman was at that time valid.

Again, reference was made to the sixty-ninth canon, which is intituled, "Ministers not to defer christening, if the child be in danger," and which declares, "That if any minister, being duly, without any manner of collusion, informed of the weakness and danger of death of any infant unbaptized in his parish, and thereupon desired to go or come to the place where the said infant remaineth, to baptize the same, shall either wilfully refuse so to do, or of purpose, or of gross negligence, shall so defer the time as when he might conveniently have resorted to the place, and have baptized the said infant, it dieth, through such his default, unbaptized, the said minister shall be suspended for three months, and, before his restitution, shall acknowledge his fault, and promise before his ordinary, that he will not wittingly incur the like again."

The argument founded upon this canon was, that the church necessarily presumed that if the minister did not go, the child would die unbaptized, whereas if the church had held that baptism by a lay person was valid, it could not have so presumed, inasmuch as it would presume that in case of imminent danger of the life of the child, the father or mother or other person would baptize the child.

This does not strike me as an argument of any great force. The church supposes that every person will pay obedience to its laws—that no person

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will, by baptizing a child, intrude into that which the rubric of such church seems to imply is the proper office of a lawful minister—of a person in holy orders, and the church possibly supposes that the more conscientious and the more scrupulous persons are in conforming to the law of the church, the greater danger there will be of the child dying unbaptized, through the neglect of the minister in not attending when sent for. There is nothing, however, in this canon inconsistent with the validity of lay baptism. It merely proceeds upon the supposition that a person wishing to obey the law of the church, might decline taking upon himself the office of baptism, and that therefore the child might die unbaptized, in consequence of the minister not attending for the purpose of baptizing the child.

It has been also stated, that much is to be gathered from the opinions of other reformed churches upon the subject of lay baptism : that the churches in France had declared that persons who had been baptized by laymen, should be rebaptized, and I think a solemn declaration of the Scotch church was cited, to show that they hold lay baptism to be invalid. Now if there was such a declaration in France, and not in other reformed churches, it would seem to me to argue rather the other way. They may have been satisfied that lay baptism was invalid, and therefore they declared it to be so. The Church of England not being satisfied that lay baptism was invalid, on the contrary, holding it to be valid to a certain extent at least, did not issue any such declaration. When the Church of England holds out such an inducement as it does by the rubric at the end of the baptismal service, say-

ing, that if the child dies, having been baptized without actual sin, it shall be saved ; and when the parents are called upon to take the earliest possible opportunity to put the child in that state in which it may be considered entitled to salvation, I think it is beyond all possibility of doubt, that if it had been the doctrine of the Church of England that lay baptism was invalid, that church would have expressly declared that a child baptized by lay hands was not lawfully baptized, and therefore must be rebaptized. The rubric says, that “ children which are baptized dying before they commit actual sin, are undoubtedly saved.” The parents therefore are naturally anxious to put the child in a state in which it shall be entitled to salvation, and might take upon themselves the office of baptizing the child. The Church of England has made no declaration of the invalidity of baptism by lay hands, and I think it would have done so if its judgment were that lay baptism was invalid, contrary to the practice of the church for twelve hundred years.

Then it seems to me upon the whole of this case, that the law of the church is beyond all doubt that a child baptized by a layman is validly baptized. It has not been shewn to my satisfaction that a Wesleyan minister is a schismatic or a heretic, and therefore it is unnecessary to inquire whether heretical or schismatical baptisms are or are not valid. There were many disputes in the early ages of the church as to schismatical and heretical baptisms, and there are passages to be found in the canon law entering into discussions as to whether baptisms administered by schismatics or heretics ought to be repeated or not. The general opinion, I think, is, that they ought not to be repeated, provided the

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proper form was observed, for that was considered the essential point in these cases.

Therefore, in the view which I have taken, to my mind at least it is clear, that the law calls upon me to pronounce that the Articles admitted in this case have been proved; that the party promoting the office of the judge has established, that Mr. Escott, the minister and incumbent of the parish of Gedney, being duly informed, and having due notice of the death of the child, and due notice of the funeral, and being also duly informed that the child had been baptized by a Dissenting minister, refused to perform the office for the interment of the dead over the body of that child; and that Mr. Escott has failed in establishing, to my satisfaction at least, that the church does consider a child baptized by an unordained minister, by a minister of the Wesleyan body who has no authority to baptize either from the church, or from the body to which he belongs, (though they could confer upon him no authority which the church would acknowledge, beyond that of a layman), is not validly baptized; and consequently has failed to establish, to my satisfaction at least, that the child in this case was unbaptized according to the doctrine of the Church of England, and according to the meaning of the rubric prefixed to the order for the burial of the dead. The sentence therefore which the Court must pronounce must be, that Mr. Mastin has sufficiently proved the Articles by him exhibited, and that Mr. Escott has failed in proving the Allegation by him given in.

The only remaining consideration is, what is to be the punishment to which the Court must necessarily subject Mr. Escott, under the circumstances

of the case? It has been very properly stated upon the part of the promoter, that he had no wish whatever to follow up these proceedings in anything like a vindictive manner—that he should be perfectly satisfied if the Court would admonish Mr. Escott to abstain from like conduct in future, and to condemn him in the costs of these proceedings. In *Kemp v. Wickes*, my learned predecessor contented himself with admonishing the party, and I should be glad to follow that example, if I could do so with propriety or safety. In that case there was no intention of appealing to a higher tribunal. But this case, I presume, will not stop here—it was stated in the course of the argument, to have been brought here for the purpose of taking the opinion of the Ultimate Court of Appeal upon the question—and if I were to give any sentence other than that directed by the canon, I might possibly defeat the intentions of both parties, of getting the decision of the Court of Appeal upon the point, whether a person so baptized is validly baptized within the meaning of the rubric, so as to entitle him to Christian burial. I am afraid I am bound by the canon, which requires a sentence of three months' suspension upon a person who refuses to christen or to bury a child after notice given him for that purpose. I cannot see my way to modify the sentence, this being a proceeding under the sixty-eighth canon, and that canon expressly fixing the punishment of suspension for three months.

The Court pronounced Mr. Escott subject to a suspension for three months, and condemned him in the costs of the proceeding.

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Affirmed on appeal, by the Judicial Committee. *L. Moore P.C.C. 104*

PREROGATIVE COURT OF CANTERBURY.

1841.

April 26th.

Probate granted of a will and two codicils, the first codicil not attested, but the latter being duly executed and referring to the former, and thereby operating as a due execution thereof.

In the goods of I. F. SMITH, deceased.

The testator in this case executed a will in June, 1835, by this will he gave the whole of his property to his widow for life ; and, after her death, left the principal to his children as settled in a deed of assignment, executed by him in 1833, on their behalf.

In May, 1838, the deceased wrote a codicil which he signed, but there were no witnesses to it. In August, 1840, he made a further codicil, which was signed by him at the foot and duly attested.

This was written on the second side of the paper on which the former codicil was written, and the deceased described it as "a second codicil to my last will and testament."

Haggard prayed probate of the will and two codicils, but without the deed as part of the will, he submitted that it was not testamentary, and that if necessary, the trusts might be enforced in a Court of Equity.

SIR HERBERT JENNER.

The latter codicil being duly executed, referring to the former, is an execution of the former codicil also. Let probate pass of the will and codicils ; the deed should also form part of the probate.

GOLDIE *against* MURRAY.

1841.

May 12th.

This was a cause of proving, in solemn form of law, the will of John Kilpatrick, deceased, who died on the 4th of August, 1840.

A party propounding a will having become bankrupt, directed to give security for costs.

The will dated on the 1st of August, 1840, was propounded by James Goldie, one of the executors named therein, and was opposed by Adam Murray, an executor in a former will dated July, 1839.

The will had been propounded in a *condidit*, and an Allegation on behalf of Mr. Murray, in opposition to the will, had been admitted, and publication of the evidence upon that Allegation prayed; a responsive Allegation was now asserted by Goldie, who had lately become a bankrupt.

The *Queen's Advocate* and *R. Phillimore* prayed the Court to direct Mr. Goldie to give security for costs. The party being an uncertificated bankrupt, could possess no property, and the Allegation now asserted would, if brought in, occasion considerable expense, and which if Mr. Goldie be condemned in costs, Murray would have no means of obtaining from him. They cited *Webb v. Ward*, (a) *Heaford v. Knight*, (b) and *Mason v. Polhill*, (c) to shew that at law an uncertificated bankrupt was required to give security for costs.

Addams opposed the application. By the rules in the Courts of Common Law, the party benefited

(a) 7 T. R. 296.

(b) 2 B. & Cr. 579.

(c) 1 C. & M. 620.

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by the suit should give security for costs ; here the executor represents the legatees under a will and protects their interests, and the bulk of the deceased's property in this case is given to charities in Scotland. Whatever interest Mr. Goldie himself had now belongs to his creditors.

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In this case the will has been propounded by Mr. Goldie in a *condidit*, on which the two subscribed witnesses have been examined. An Allegation was then admitted on behalf of Mr. Murray, the answers of Mr. Goldie were taken to that Allegation, and witnesses have been examined in support of it, and publication of the evidence was prayed by Mr. Murray, but that was stopped by the assertion of an Allegation by Mr. Goldie, that Allegation stands for admission on the next Court day, and certain costs must be occasioned by it.

Mr. Goldie, the party in the cause, has become a bankrupt, and it has been stated that a meeting of his assignees and creditors has taken place for the purpose of their determining whether the suit should be carried on in the name of the bankrupt in order to establish the will. Mr. Murray, on the other hand, prays, that an order may be made that Mr. Goldie should give security for costs. It appears to me that this is peculiarly a case in which the Court should direct security for costs to be given. Mr. Goldie is now possessed of no property, whatever interest he takes under the will, belongs to his assignees to be distributed amongst his creditors. What can the Court do in such a case ? It cannot direct the assignees to give security, for they are

not before the Court. I can only direct Mr. Goldie to give security, and if the assignees think that the suit should be carried on, they must find security for him. The suit must be carried on in his name, and in case the Court should pronounce against the will, and condemn him in the costs, the other party, without security, would have no means of recovering his costs.

The Court directed security to be given in the sum of 250*l*.

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In this case the will was eventually pronounced against, and Mr. Goldie was condemned in the costs, provided they did not exceed the sum of 250*l*.

THORNE *against* ROOKE (heretofore WORRALL.)

On the admission of an Allegation.

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This was a cause of proving a codicil to the will of George Rooke, Esq., deceased, who died on the 15th of December, 1839. Probate of the will and five codicils was taken, on the 20th of February, 1840, by George Worrall, Esq., the then surviving executor, who died on the 6th of May, 1840. On the 30th of May, 1840, a decree issued, at the instance of Frances Thorne, citing the executrix of Mr. Worrall (who had taken the name of Rooke) to take probate of a further codicil, dated the 24th of September, 1838, which she refused to do. The codicil was then propounded by Frances Thorne,

An Allegation setting up parol evidence in order to shew that two codicils were not intended to operate together, but that the latter revoked, the former rejected; there being no ambiguity on the face of the papers themselves.

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the legatee named therein, in a *condidit*, upon which the attesting witnesses were examined; the codicil was as follows:—"By this codicil to my will, I give and bequeath to Mrs. Frances Sophia Stafford, born Thorne, now residing at No. 18, Elm Tree Road, St. John's Wood, London, the sum of two thousand pounds, to be paid to her within three months after the date of my death. Dated this 24th of September, 1838. George Rooke. The above sum of 2000*l.*, to be paid clear of legacy duty. G. R." The codicil was duly attested.

An Allegation was now offered in opposition to the codicil, which pleaded in substance,

First.—That George Rooke, Esq., (the deceased) while resident in the Albany, carried on, in the year 1837, and for some time previously, an illicit cohabitation with Frances Thorne, one of the parties in this cause, and thenceforward continued so to cohabit with her until his death, and that he was very reserved on the subject of such cohabitation, &c.

Second.—That the testator in consideration of such cohabitation, on the 24th of September, 1838, wrote, with his own hand, the codicil now propounded. That the same being executed, was sealed up in an envelope with three seals, and delivered by the deceased to Frances Thorne to take care of, that the deceased subsequently, but previous to the 26th of April, 1839, informed her of the amount that he had given her by the said codicil, and recommended, in case of his death, that she should sink the same in an annuity for her life.

Third.—That in the early part of 1839, the deceased was taken seriously ill, and was advised

to remove from the Albany. That thereupon he took up his residence with the said Frances Thorne, in a house rented by him for her; that the illness of the deceased, which was eventually the cause of his death, was a spine complaint, confining him to his bed; that the same to some extent affected his memory generally and especially so when under accesses of pain; that soon after such change of residence by the deceased, Frances Thorne made frequent representations as well to the deceased as to other persons, that as she had lived and cohabited with the deceased for so long a period, the amount left to her by the said codicil was not sufficient, and moreover expressed a desire that such codicil should be more formally executed, and she did not consider and had been advised that it was not safe, &c.

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Fourth.—That previous to the 26th of April, 1839, the deceased gave instructions to H. W. an acquaintance of his, and the solicitor of the said F. T. to have another codicil prepared in lieu and substitution of that of the 24th of September, 1838; that the same was executed on the 26th of April, 1839. That the deceased acting under the reserve hereinbefore pleaded, abstained from employing his own confidential solicitor.

Fifth.—That the deceased on several occasions, both before and after the execution of such codicil, informed the said H. W. or gave him to understand that the provision made therein was the sole or whole benefit which he intended the said F. T. to take on his death, or gave the said H. W. to understand that such codicil was in substitution for and in satisfaction of any benefit which he had pre-

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viously given to the said F. T. by any testamentary paper, and that he did not at any time subsequent to the execution of the said codicil, intimate or give the said H. W. to understand that he considered the said codicil (of the 24th of September, 1838) as a valid subsisting instrument, or that would have any effect at his death; that the deceased believing and intending the codicil of the 26th of April, 1839, to be a revocation of all previous testamentary benefits to the said F. T., did not take any further or other steps towards the destruction, cancellation, or other revocation of the said codicil of the 24th of September, 1838.

Sixth.—That from the time when the codicil (24th of September, 1838) was delivered to the said F. T., it remained in her possession, and never afterwards came into the hands or possession, or under the notice or control of the said deceased.

Seventh.—That the said Hannah Rooke, then the wife of George Worrall, Esq., having been informed of the illness of the deceased, went to stay with him, and remained with him for several months to nurse him. That hearing his death was expected, she again accompanied by her husband, again proceeded to the residence of the deceased, but found that he had died before her arrival. That during the time she remained there with her husband, who was the surviving executor named in the will of the said deceased, the said H. W. attended as solicitor and legal adviser to the said Frances Thorne, and produced and delivered to the said George Worrall the codicil dated the 26th of September, 1839, and the two codicils of subsequent date, and also other papers belonging to the said

deceased, but neither he nor the said F. T. produced or made any reference to the codicil of the 24th of September, 1838, and that as well the said H. W. as the said F. T. then and about such time frequently declared that the papers so delivered up were the only papers which she the said F. T. possessed of or belonging to the deceased.

Eighth.—That on the 20th of February, 1840, probate of the will, with five codicils, was granted to the said George Worrall. That the fact that probate of such papers was about to be applied for, and that such probate had been granted, were at and about the times when such application was made, and such probate granted respectively severally well known to the said Frances Thorne, and also to the said H. W.

Ninth.—That a bill was filed in the Court of Chancery by the said Frances Thorne for payment of legacies under the codicil of the 26th of April, 1839, that she did not therein in any manner refer to the codicil of the 24th of September, 1838.

Tenth.—That in March, 1840, the existence of the said codicil was for the first time made known by the said H. W., a copy thereof being sent with a request that it should be proved by the said George Worrall, Esq.

Eleventh.—That previously to the preparation and execution of the codicil of the 26th of April, 1839, the said Frances Thorne frequently conversed with Mary Street, a servant of the deceased, and who was one of the subscribed witnesses to the codicil of the 24th of September, 1838, on the subject of such codicil, and the sum of two thousand pounds, which was therein left to her, that at such

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times she frequently stated to the said Mary Street that she considered such sum to be too small, considering the time she had lived with the testator, and also that she did not consider such codicil was safely made, and that she had been so advised.

Twelfth.—That after the said codicil of the 26th of April, 1839, had been executed, and at times when the said Frances Thorne was in the daily and constant habit of communication with the deceased, she also frequently informed the said Mary Street that every thing was now settled by an annuity, that it was very handsome, and that the codicil to which she and “Walker” had been witnesses was of no use, meaning thereby the codicil of the 24th of September, 1838, and the said Frances Thorne frequently used other expressions of that or the very like effect.

Thirteenth.—That at the time the deceased removed to Elm Tree Road, he was attended by Elizabeth Gutteridge as nurse; that the said Frances Thorne was in the habit of frequently conversing with the said Elizabeth Gutteridge; that in one or more of such conversations she informed her of the testamentary disposition made by the deceased in her favor. That in September, 1839, Frances Thorne, in one of such conversations, stated to the said Elizabeth Gutteridge the contents of the codicil of the 26th of April, 1839, and all its provisions and the trustees therein named, and also in reference to the former codicil, described the same as of no validity, and stated that it was remaining in her possession, but the deceased knew she would make no use of it, or she the said Frances Thorne intimated her knowledge and conviction from the

acts and expressions of the said deceased, that he the said deceased did not intend that it should take effect on his death, and did not consider it as an operative and subsisting instrument.

Fourteenth.—That about the time of the death of the deceased Frances Thorne again referring to her possession of such codicil, said to the said Elizabeth Gutteridge, that she had taken advice upon it, and that she had mentioned it to Mr. Ward, who had informed her that it was all right and correct, and that she ought to keep it, which she intended to do. That in very many conversations held between the said Frances Thorne and the said Elizabeth Gutteridge, the said Frances Thorne invariably expressed or implied the fact that one codicil was substituted for the other by the said deceased, and that consequently the former codicil was of no validity or use, and that such meaning and intention of the said deceased was clearly made known by the said deceased to all parties connected in any way with the taking instructions for and the preparation of such codicil, as also to the said Frances Thorne, &c.

The admission of this Allegation was opposed by *Addams* and *Waddilove*.

Under the present law no such case as this can be set up. The question must be governed entirely by the statute 1 Vict. c. 26. The codicil is dated long after that act came into operation. The 20th sect. of that statute is this, and be it further enacted, “that no will or codicil or any part thereof, shall be revoked otherwise than as aforesaid, (that is, by marriage under the 18th section) or by another will or codicil executed in manner hereinbefore re-

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quired, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same." Is then the present instrument revoked? It is unburnt and untorn—then is it revoked by any codicil? if so, by which?—If neither of the codicils revoke this instrument, you cannot set up a revocation otherwise.

But independently of the statute the facts of this case would not amount to a revocation. In *Greenough v. Martin*, (a) the Court said, "the intentions of the deceased as to what instruments shall operate as and compose his will are to be collected from all the circumstances of the case taken together." The present Allegation does not set up all the circumstances, it is an uncandid Allegation. In *Smith and Blake v. Cunningham*, (b) it was held that testamentary instruments regularly executed are hardly to be deemed revoked by inference and implication under any circumstances—the Allegation does not contain facts which would unequivocally lead the Court to the conclusion that the deceased intended this codicil to be revoked.

The Queen's Advocate and Nicholl.

It is contended that this codicil is not revoked by reason of the statute 1 Vict. c. 26, s. 20, but that statute leaves the law as it was, provided the will or codicil be duly executed. It is not necessary, in order

(a) 2 Add. 239, 243.

(b) 1 Add. 448.

to revoke a former will or codicil, that a later instrument should contain express words of revocation ; it may be equally done by implication. In all the cases of that kind in this Court, parol evidence has been admitted, not for the purpose of revoking the former paper, but to shew with what intention the latter instrument was made. *Methuen v. Methuen*,^(c) *Greenough v. Martin*; *Smith v. Cunningham*; the Allegations were admitted in all those cases. This was clearly the law before the recent statute, and had it been the intention of the legislature to alter the law in this respect there would have been some express enactment to that effect ; but it is as it was previously, parol evidence is therefore admissible. As to the contents of the Allegation, it is submitted that it is clear that the deceased in executing the latter codicil intended it as a substitution for that which is propounded in this cause.

The Court took time to deliberate, and on the 8th of July gave its opinion.

JUDGMENT.

SIR HERBERT JENNER.

This question arises on the admission of an Allegation in opposition to a codicil to the will of Mr. George Rooke, who died on the 15th of December, 1839. The admissibility of the Allegation was argued a considerable time ago, and the Court postponed giving its opinion until a decision had been given by the Lords of the Privy Council in the case of *Reeve v. Kent*, with respect to the admissibility of an Allegation which had been rejected by

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^(c) 2 Phill. 416. See Williams' Executors, vol. 1, p. 118, and vol. 2, pp. 1020, 1023, 3rd edition.

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this Court, under circumstances not precisely similar to the present, but under the new statute relative to wills, and the Court thought that it might possibly throw some light upon the construction which is proper to be put upon that statute. The Court has been favored with the judgment delivered in that case, but it does not appear to bear materially upon the question now for the consideration of the Court.

The Court will now proceed to deliver its opinion in this case. The deceased was a bachelor, he died possessed of personal property to the amount of about 25,000*l.*, and also of considerable real property, the amount of which does not appear; his nearest relation was a lady of the name of Rooke, she is stated to have been his nearest relation and that he was brought up by her. The testamentary papers left by the deceased were a will, dated the 14th of May, 1827, and five codicils dated the first in May, 1829; the second, in January, 1833; the third, the 26th of April, 1839; the fourth, on the 23rd of May, 1839, and the fifth, on the 14th of September, 1839; of these instruments probate was taken in February, 1840: some time, however, after that probate had been granted, a further codicil was produced, of which the executors were called upon to take probate, but which they declined to do; and it is with regard to this codicil, dated the 24th of September, 1838, that the question now arises.

This codicil has been propounded in a *condidit*, by the party who is interested under it, and the attesting witnesses have been examined in support of it. This codicil purports to be in the handwriting

of the testator, it is signed by him and is attested by witnesses ; it is to the following effect :—“ By this codicil to my will, I give and bequeath to Mrs. Frances Sophia Stafford born Thorne, now residing at No. 18, Elm Tree Road, St. John's Wood, London, the sum of two thousand pounds, to be paid to her within three months after the date of my death. Dated this 24th of September, 1838.”

“ GEORGE ROOKE.”

And under the name George Rooke, is “ the above sum of 2,000*l.* to be paid clear of legacy duty.” G. R. This codicil was delivered into the hands of Mrs. Frances Sophia Stafford, and sealed up at the time, and it remained in her possession without the knowledge of the executors, till the month of March, when it was first communicated to the solicitor to the executors.

Now this paper is regularly executed by the deceased and attested by witnesses in conformity with the act, as far as appears ; it is uncanceled and perfect, and it is not denied that it is in the handwriting of the deceased and executed by him when in perfect capacity, and it is not alleged that any fraud was practised upon him in obtaining the instrument ; therefore it is entitled to probate unless it should be revoked by some paper of a subsequent date.

The paper which is alleged to have that effect, is that which is dated the 26th of April, 1839, which purports to give Mrs. Stafford a larger proportion of the deceased's property, to make a further provision for her than was made by the codicil of the 24th of September, 1838, and it is contended that the latter codicil revokes the former.

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The two papers being uncanceled at the death of the deceased, it lies with the party who contends that the one is a revocation of the other,—that the one is substituted for the other,—to prove the grounds upon which the Court is to come to that conclusion; for as the papers remain in the state I have described, they are *prima facie* entitled to probate, and both may stand, unless it can be shewn that there is by necessary implication, or in some way, a revocation of that originally executed by the deceased to make provision for this lady.

The purport of the latter paper is to give to certain trustees the sum of 13,433*l.* 6*s.* 8*d.*, three per cent. consolidated Bank annuities, and it directs that they shall pay the interest to Frances Thorne, passing by the name of Mrs. Stafford, during so long as she shall live, and shall not sell, mortgage, or otherwise charge or dispose thereof by anticipation, or become bankrupt or insolvent, or do any act whereby the same, if limited to her for life, would become payable to any other person; and subject to the trusts hereinbefore declared, shall permit the said trust monies, stock, funds, and securities to return to, and become part of the residue of my personal estate disposed of by my said will. And I declare that the marriage of the said Frances Thorne shall not be a determination of the trust hereinbefore declared for her benefit, provided that previous to such marriage she shall settle her estate and interest under the trusts aforesaid for her separate use." It then goes on to give a legacy of 100*l.* to Mrs. Stafford, by the name of Thorne, to be paid within one month after his death, free of legacy duty. It also gave a legacy to

his faithful servant Charles White of fifty guineas during his life. It gave to his servants, Mary Streets and Knowles, and his groom Edward, the sum of 50*l.* a-piece, clear of legacy duty ; and it gave his grey horse, Escape, to his friend Mr. Ward. It is signed and attested by two witnesses.

The contents of the will and other codicils are immaterial to be stated, except the last codicil, which has reference to that just read, namely, the codicil executed on the 14th September, in which he recites that he has given a legacy to Mary Streets. It revokes that legacy, and then confirms the codicil in all other respects. These then are the two testamentary papers upon which the opinion of the Court is called for.

Before considering the contents of the Allegation, it will be necessary to consider a little the principle on which these Courts proceed, with respect to papers which are not in themselves expressly revocatory of a former paper ; to consider how far it is in the power of the Court to act on parol evidence against the contents of papers, which if duly executed, must be presumed to contain the final intentions of the persons who executed them.

I apprehend, that in all these cases, the Court, in the first instance, must look to the papers themselves in order to discover whether there is anything in the nature of ambiguity, or any absurdity arising out of insertion or omission—which you please ; and if it should find that the papers themselves, by necessary implication, or from an ambiguity raised on the contents of the instruments, show that it was not the intention of the deceased that they were to operate, then the

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Court may admit parol evidence to remove that difficulty. It appears to me, upon the rules acted upon in this Court, that it is not, without there is some doubt, some ambiguity, or some absurdity arising from an insertion or omission, that this Court interferes to pronounce that the declaration of the one is revocatory of the other, or holds that it is a substitution of the other. I apprehend that this rule applies equally to this Court, as it does to the Court of Construction. In addition to that, where there is this ambiguity, the Court does not interfere unless it finds that the evidence offered to be produced is sufficient and satisfactory to explain the ambiguity or remove the difficulty that may arise on the construction of the papers. I find this laid down in a variety of cases in this Court, of which two or three were mentioned in the course of the argument. The cases more particularly referred to were *Methuen v. Methuen*, (a) *Greenough v. Martin*, (b) and *Smith v. Cunningham*. (c) One or two cases were referred to at common law, particularly *Campbell v. The Earl of Radnor*, (d) in which the practice of the Ecclesiastical Court was alluded to without terms of disapprobation by Lord Loughborough, sitting as first commissioner of the Great Seal, in 1783. But in the first instance, it is necessary that the Court should look a little at the grounds laid down, and the decisions which have taken place in this Court, which are the sole authority in the first instance in all cases arising in the jurisdiction of the province of Canterbury. I find in the first case, for

(a) 2 Phill. 416.

(b) 2 Add. 239.

(c) 2 Add. 448.

(d) 1 Br. C. C. 271.

it is not by a reference to one or two cases only that the rule and practice of the Court can be satisfactorily ascertained, because they may turn upon particular circumstances occurring in those cases; but the rule and practice must obtain, from an examination of cases of a similar description, where the same principle is to be applied, under different circumstances; and the first case to which I will refer is that of *Fawcett v. Jones (a)*, which occurred in 1810. That case was not precisely similar to the present, for there the Court was prayed to insert a clause, from the instructions, which might give a different effect to an instrument of which probate had been taken. But the principles which the Court laid down, as those by which it acted with respect to the admissibility of parol evidence, were there stated in a very explicit manner, the learned Judge says, (p. 476,) "I apprehend it is a general leading principle, that, when an instrument has been executed by a competent person, you must presume that the person so executing it knew the contents and the effect of the instrument;" that is the first point. "If the contents be doubtful, you may receive extrinsic evidence for the purpose of explaining and construing an instrument. But if a will speaks clear of all doubt, no parol evidence can be admitted to construe it. The Courts have only deviated from those presumptions where some ambiguity arises upon the executed instrument. There exists no very material distinction in principle between the Court of Probate and Courts of Construction, so

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far as respects the present point," which was the admissibility of parol evidence to explain the circumstances under which the clause was omitted and overlooked; and in the course of that judgment, in illustration of the principle in which the Court acted, it referred to several other cases, as those in which there was an ambiguity as to the *factum* of the instrument; not in its construction. The first is *Matthews v. Warner* (a), where parol evidence was rejected by the Prerogative Court and the Court of Delegates, because they held that upon the face of the instrument there was no ambiguity; that was the principle upon which parol evidence was rejected in those Courts; it is true that in the Commission of Review in that case, parol evidence was admitted, but it was on the express ground that, upon the face of the instrument, which was headed "Plan of a will," and was written on a piece of office paper, ruled over with red lines, there was an ambiguity sufficient to let in parol evidence; therefore, the principle upon which such evidence was rejected in the Prerogative Court, namely, that there was no ambiguity, was not impugned by what took place in the Commission of Review.

Another case referred to was, *Lord Cholmondeley v. Lord Walpole*, (b) in which there was a codicil which expressly referred to a will by date. The deceased had executed a subsequent will, and a doubt was suggested to which of the two wills he meant to refer. The Court of King's Bench rejected parol evidence, because there was no ambiguity.

(a) 4 Ves. 186.

(b) 7 T. R. 138.

In *Lord St. Helens v. The Marchioness of Exeter*, (a) the codicil in question referred to a will not existing; therefore there was an ambiguity, and parol evidence was admitted in that case, in order to ascertain to what will the codicil referred. Sir John Nicholl ~~goes on~~ to say, "I must here observe, that in the Court of Probate there must be some ambiguity, not upon the construction, but upon the *factum* of the instrument,—not whether a particular clause will have a particular effect, but whether the deceased meant that particular clause to be part of the instrument; whether the codicil was meant to republish a former or a subsequent will; whether the residuary clause was fraudulently introduced, without the knowledge of the testator,"—as in the case of *Barton v. Robins*, (b) ("for fraud," he says, "of course would go to the foundation of the will,") "whether the residuary clause was accidentally admitted as in the case of *Janssen v. Damer*; (c)—whether an instrument be subscribed in order to authenticate it as memoranda for a future will, or to execute it as a final will, as in *Matthews v. Warner*; these are all questions of ambiguity upon the *factum* of the instrument." Then he referred more fully to the case of *Damer v. Janssen*, which he considered to apply to the circumstances then under consideration. He also referred to other cases which contained the same principle, — *Bridge v. Arnold and Cranke*, (d) where an attorney had inserted, "for his own use and benefit," instead of, "as a trustee." The case

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(a) 3 Phill. 461. n. 478.

(b) 3 Phill. 455, n.

(c) Reported as *Blackwood v. Damer*, 3 Phill. 458, n.(d) *Ib.* 455.

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of *Gerrard v. Gerrard* (a) is alluded to, where there was the omission of the name of the person to be appointed executrix and residuary legatee, he appointed “*her*” executrix and residuary legatee, and there was no name to which the pronoun “*her*” referred; but by admitting the instructions, and receiving parol evidence, it was clear the words “*my dear wife*” had been omitted, in writing over the will, and “*therefore parol evidence was admitted to explain the ambiguity in the will itself.*” This is the case set forth in *Fawcett v. Jones*.

In the case of *Draper v. Hitch*, (b) in order to justify the introduction of parol evidence, it was thought that there was an ambiguity with respect to a clause of revocation. In that case, the party, a married woman, had a power under two separate instruments, to make a disposition of her property, one her own marriage settlement, the other under a codicil to the will of her mother. There the will was drawn by a conveyancer, and she consented to revoke the disposition under the power which she had exercised under her mother’s codicil, and without communication with the conveyancer, there was added a clause of revocation revoking all former wills, whereas it was only intended by her to apply to property which passed under her mother’s codicil. The Court held that sufficient was shown to justify it in admitting the Allegation to proof, but when the evidence came to be considered, the learned judge was of opinion that there was no ambiguity at all on the face of the papers themselves; nor was there sufficient ambiguity raised

(a) *Ib.* 484.

(b) 1 Hagg. E. R. 674.

by the evidence to justify him in limiting the clause of revocation to that part of the testamentary disposition which had reference to the power under the second codicil. Accordingly, he directed the general administration which had been before granted, with will annexed, to be delivered out. He did not pronounce against the validity of the first will, because there was some doubt existing as to the manner in which the revocatory clause had been executed by the testatrix. That was determined by the Court of Construction.

In *Harrison v. Stone*, (a) the Court laid down the same principle, that there must be "some ambiguity on the face of the executed instrument," and the means of obtaining clear and indisputable proof that the omission of the clause was contrary to the intentions of the testator; and these circumstances together concurring, the Court has inserted a clause to give effect to that which there could be no doubt was the intention of the testator. These are the principal cases which have occurred.

It is true that none of these cases refer to the circumstances of two codicils making a provision for the same person, whether the latter operates as a substitution of the other, and thereby revokes it. But two cases were stated in the course of the argument which it was contended were direct upon this point, that parol evidence would be admitted against the contents of the codicil. These cases were *Methuen v. Methuen*, (b) and *Greenough v. Martin*. (c)

Methuen v. Methuen occurred in 1817. The marginal note to that case is as follows: "A codicil

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(a) 2 Hagg. E. R. 537.

(b) 2 Phill. 416.

(c) 2 Add. 239.

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virtually revoked by another codicil of a subsequent date, there being no express words of revocation in the latter instrument." So far as the marginal note goes, it is an authority for the admission of parol evidence to show that a codicil may be virtually revoked by another of a subsequent date. In that case, parol evidence was admitted though no express words of revocation were contained in the latter codicil. In that case Mr. Paul Cobb Methuen made a will and three codicils, the will was dated in October, 1809, the first codicil in 1812, the second on the 10th of May, 1813, the third on the 1st of April, 1815; and the question arose with respect to these latter codicils, of May 10th, 1813, and of the 1st of April, 1815.

The circumstances of that case were very peculiar; they arose partly out of a settlement upon the marriage of the testator, and partly out of a disposition, made by his will, with respect to his younger children, daughters more particularly, and also with respect to a settlement made upon the marriage of his second daughter after the date of the first codicil, and just immediately after the date of the second codicil. One of the daughters had been married before. Now in the first codicil, the disposition made by the will was recited, as it was in the latter codicil also. The latter had reference to the marriage of the second daughter. He had also, by the *first* codicil, made a further provision for his wife by giving her the interest of 1200*l.* for her life, which, after her death was to be divided amongst his four daughters. By the *second* codicil, April 1st, 1815, he also recited the disposition by the will, the settlement of the property that had

been made, and also the contemplated marriage of his second daughter, and the appointment made by the will was expressly revoked and annulled as far as regarded her; and this codicil also gave to his wife, as a further provision for her, an annuity or yearly sum of 600*l.*, that is an annuity equal to the interest of the 1200*l.*, at five per cent. given by the former codicil. In that case my learned predecessor said, "The first instrument remains uncanceled, and there are no revocatory words in the second. It is contended that the Court has no power to inquire any further, but the same rules do not apply in a case relating to the *factum* of a will, which would apply if the injury was concerning the construction of it." That is an observation made in reference to the peculiar circumstances of the case then under consideration. Though it may be true that we do not hold ourselves so strictly bound in a Court of Probate as to contents of instruments as they do in a Court of Construction, yet it is not intended by these words to say that we adopt false rules; that the principle on which we act is not definite, although we may be not quite so strict in the mode of applying it. He went on to say, "In the Court of Probate, the whole question is one of intention." So I apprehend it is in a Court of Construction. "The *animus testandi* and the *animus revocandi* are completely open to investigation in this Court. Suppose," he says, "in a case of fraud or in a case of error," referring to some case to which he has not expressly alluded, "the residuary clause is omitted, it may be inserted by the Court." That was the rule, as it seems, at that time; but whether the Court has such power at

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present, is a matter for further consideration. He says, "It is admitted that if there is any doubt on the face of the instrument, the Court may admit parol evidence. On the face of the papers, it rather appears as if the testator intended one for the other." They were not both in his possession, one, the first codicil executed, was at his house in Wiltshire, and this was in London, or it might be *vice versá*. He goes on, "It certainly is not absolutely impossible that the deceased might have intended to increase the portions of his daughters and the annuity of his wife, but circumstances render it highly improbable that he should so have intended." And these circumstances were, that if the codicil had been acted upon, the property of the deceased would not have been equal to the payment of all the legacies that had been given, but one of the daughters must have abated in some part of the share, which she took under the testamentary disposition. He says, "There is a strong probability that he intended it as a substitute, and not as an independent codicil. Evidence, however, being admissible, there can be no doubt whatever." He accordingly pronounced for the will and the two other codicils, holding this to be revoked.

The other case, *Greenhough v. Martin*, (a) occurred in 1824. In that case the testatrix was a very old woman living with her nephew. She had in her service two persons of the name of Martin, one her butler, who had lived with her many years, the other, whose name was originally Fletcher, had been her personal attendant for many years, and had married the butler; the testatrix, although

(a) 2 Add. 329.

entirely blind, wrote a will and five codicils; and with reference to the particular question before the Court in that case, it is only necessary to state that by the will, dated in March 1821, she gave to her butler the sum of 300*l.*; to her servant, Mrs. Martin, 300*l.*, and an annuity of 50*l.* for life, and to each of these, she gave 15*l.* for mourning. In May, 1821, by a codicil, also in her handwriting, she gave 200*l.* to each of these servants in addition to what she had given them in her will, as expressly stated in the codicil. In January, 1822, she executed a second codicil, also in her handwriting, by which she gave 400*l.* to each of these servants, in addition to what she had given them by "*her will*," making the benefits amount to 700*l.* each. By a third codicil, in September, 1822, she gave to Mrs. Martin her round silver salt-spoons. By a fourth codicil, in December, 1822, she gave to Martin and his wife 500*l.* each, but in that codicil she does not mention her will. She afterwards, on the 30th of December, 1823, executed another codicil, by which she revoked several legacies to her servants, with the exception of those to Martin and his wife, and then proceeds, "The legacies of 300*l.* and 300*l.*, which I have, by my will, given to Henry Martin and Elizabeth Martin," evidently referring to the bequest in the will, as that only meant at that time. "I hereby increase to the sum of 1000*l.* each." Then it goes on to state that the legacy to Elizabeth Martin is to be in addition to the life annuity; "and I further and additionally give to the said Henry Martin and Elizabeth Martin 15*l.* each for mourning; my said will having been this day read over to me, I confirm the same."

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These papers were propounded on behalf of Martin and his wife, and were opposed by the executor; and the Court, after stating the circumstances of the case, said, "In a Court of Construction, where the *factum* of the instrument has been previously established in the Court of Probate, the inquiry is pretty closely restricted to the contents of the instrument itself, in order to ascertain the intention of the testator. But in the Court of Probate the inquiry is not so limited, for the intentions of the deceased as to what instruments shall operate as and compose his or her will, are to be there collected from all the circumstances of the case taken together." These circumstances were the progressive increase and her intention to make a new will, for that appeared to be her intention; but, on the suggestion of her solicitor, she changed her intention, and determined to carry it into effect by a codicil. The Court observed that these separate codicils so executed by the deceased were deposited by her at her bankers, and were not therefore immediately brought to the notice of her solicitor. She referred to the provision made by her will, not referring to the codicils, and entirely passing them by; and the Court, under these circumstances, was led to the conclusion—for very little parol evidence was admitted, and therefore the case must have been determined on its own peculiar circumstances—that the deceased did not intend that the codicils should form part of the will, and pronounced against them. From what the Court has said, this must have appeared principally on the face of the instruments: for the evidence produced was very trifling. The deceased

intending^{ed} to make a new will, instead of that^{she} executed a codicil by the suggestion of the solicitor, without noticing the intermediate codicils, and the codicil confirming the will expressly, was in itself quite sufficient to raise that ambiguity on the face of the instruments which justified the admission of parol evidence. I am not aware that there are any later cases which go into this point. Now these cases do not, as it appears to me, go further than this, that if there is a doubt upon the face of the instruments themselves—that is, upon the *factum* of the instrument—the Court has a right to satisfy itself, by all means, of the intention of the testator, whether one or other, or both of them, should form a part of his testamentary disposition.

In Courts of Equity cases have arisen, not precisely of a similar kind, but somewhat analogous, to these cases. Questions have arisen whether legacies were to be considered as accumulative or as a substitution, the one for the other, and how far parol evidence was to be admitted to explain these written instruments. Several cases have occurred; amongst others that of *Campbell v. The Earl of Radnor*, (a) in 1783. The case was referred to in the argument for the purpose of shewing that the Ecclesiastical Courts admitted parol evidence in order to shew whether legacies were accumulative, or the one substituted for the other. In that case the testatrix, by her will executed in 1761, gave to Mary Call 10*l*. and she gave a legacy to Mary Wooldridge and Barbara Smith. She made a codicil in 1768, by which she gave Mary Call 40*l*.

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instead of 10*l.* by the will, and she gave to Mary Wooldridge, for herself and her brother, 100*l.*, and to Barbara Smith 200*l.* By a second codicil in 1777, she gave to Mary Call 40*l.* as she had done before, and she gave to Mary Wooldridge, for herself and family, 100*l.*, which sum she had given to her and her brother in the preceding codicil; and she also gave to Barbara Smith 300*l.*, which was an increase of 100*l.* to the sum under the former codicil. The prayer was to establish the will, and have it declared that the second codicil had revoked the first; in the course of the proceeding, the counsel for the executors offered to read the evidence of Hugh Jackson, the attorney who prepared the second codicil, which was opposed on the other side, the object being to shew that the testatrix at the time of the execution of the second codicil, considered that the first was to be immediately destroyed; this was opposed, and Lord Loughborough is reported to have expressed himself to this effect. "If the reading of the evidence of Jackson is opposed here, I think you had better go upon it to the Ecclesiastical Court for a repeal of the probate of the codicil; that evidence would have been a ground to exclude the codicil from probate." Undoubtedly the Ecclesiastical Court would not have decreed probate, if it had been shewn that it was not the intention of the testatrix that both these codicils should operate. But Lord Loughborough does not state on what principle the evidence would be receivable here. I can understand that the evidence would have been received in the Ecclesiastical Court, for the same sum is given to Mary Call of 40*l.* instead of 10*l.* in the

will, which raised an ambiguity which would let in parol evidence. That is the utmost extent to which that case can be pushed. The result was, the Lords Commissioners decreed that the parties were only entitled to the benefit of the latter codicil.

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Many cases have occurred since 1783, and the general result appears to be, that no parol evidence is received in Courts of Equity in order to repel the natural construction of two instruments which subsist; but in the case of *Guy v. Sharp*, (a) Lord Brougham, although he rejected the declarations of the testator, was inclined to admit, and did admit *de bene esse*, the evidence as to the circumstances of the deceased and his family as proper to be introduced, in order that he might, as he says, place himself in the situation of the testator as far as he could, and thereby enable him the better to understand his meaning. He rejected the declarations, and said, evidence, whether verbal or written, could not be received to control the construction of a written instrument that spoke for itself, but facts and circumstances relating to the deceased and his family might be admitted for the purpose of shewing what was the real nature of the deceased's intentions as to legacies by two instruments.

The case of *Hurst v. Beach* (b) was referred to. The question in that case was, whether a party was entitled to a legacy under a will and also under a codicil—whether the second legacy was accumulative or substitutional? In the will, the deceased said, “I also give and bequeath to John Beach, now living with me, the sum of 300*l.* all which said

(a) 1 Myl. & K. 589.

(b) 5 Madd. 351.

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legacies I direct and desire may be paid immediately after my decease." By the codicil, she gave "to my man servant John Beach a like legacy or sum of 500*l.*;" the testatrix then gave a like sum of 500*l.* to her maid servant; and all these legacies she directed to be paid at the end of six months after her decease, without saying anything about interest. In that case a question arose whether parol evidence could or could not be admitted. Sir John Leach's opinion was against the admissibility of such evidence, but he directed an inquiry to be made as to the rule in these Courts, and that a case should be prepared for the opinion of two civilians, and the opinion of Dr. Swabey and Dr. Lushington was taken, as to whether there had been any decision in these Courts as to the admissibility of parol evidence in such cases; what was the course of practice here; and whether in such a case we should be governed by the rules of the Civil Law? The answer to that case was in effect that there was no rule of practice, no decided case of which they were aware, nor were they aware that the point had been brought under discussion; but that we should follow the rules laid down in Courts of Equity, but that in doubtful points, where the authorities did not apply, then the rules of the Civil Law would most probably be adopted here. They do not believe that the nice distinctions between parol and written evidence, or the admission of evidence in the construction of written instruments, were adopted in that law, but they thought that in the absence of any decided rule on the point in Courts of Equity, parol declarations of a testator would be received.

Sir John Leach held, there being no decided case and no rule of practice in this respect in the Ecclesiastical Court, and as the Court of Chancery had no original jurisdiction in such matters, he should follow the principles of the Civil Law, as they were acted upon in the Ecclesiastical Courts, to whom the decision of the question properly belonged, that parol evidence could not be received, and he rejected it. He says, "In some cases, Courts of Equity raise a presumption against the apparent intention of a testamentary instrument, and they will receive evidence to repel that presumption;" he says, "there are *obiter dicta* for the admission of evidence against intending both to operate; but in the *Duke of Leeds v. Osborne* (a), the point was fully argued, and Lord Alvanley appears to have inclined against receiving it. It did not, however, become necessary there to decide the question." He said, with reference to other cases that occurred, that Lord Thurlow was inclined to the admission of parol testimony; but he said, Lord Thurlow was frequently made to contradict himself; and Sir John Leach held, that at this time there was no case in which parol testimony had been received, and that he could not receive such evidence without breaking in upon the rule that parol evidence is not admissible against the express effect of a written instrument.

Looking then at these cases which are said to be analogous to the present case, although not precisely similar to it, I think the Court is bound not to admit parol evidence until it is first satisfied that

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(a) 5 Ves. 369.

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there is that doubt and ambiguity on the face of the papers which requires the aid of extrinsic evidence to explain it.

Now, the codicil propounded, (dated the 24th of September, 1838,) gives the sum of 2000*l.* to Frances Sophia Stafford, born Thorne, to be paid to her within three months after the testator's death; and it was delivered to her, and remained in her possession at the time of the death of the deceased.

The object of the next codicil, (of the 26th of April, 1839,) was to make a provision of a different kind for her, namely, to give her an annuity in the dividends of 13,433*l.* 6*s.* 8*d.*, three per cent. consols for life, taking particular care that she should not dispose of the property by way of anticipation; it also gave her 100*l.*, to be paid to her within a month of the testator's death.

Looking at the face of this instrument, there is no reference made to the former codicil; there are no words from which the Court can infer that it was intended as a substitute; it is deficient in those two points which are considered important in a Court of Construction to raise a presumption against the intention, namely, the same sum given for the same cause expressed. There are not the same causes expressed, nor the same sum given by both codicils; there are not things *ejusdem generis*; it is an annuity given her, secured for her benefit and provision hereafter, that she might not dispose of the annuity, that she might not charge it by way of anticipation; but that it might secure this provision during the whole of her life. It is quite impossible to say, on the face of the two papers, that

they do present such a case of ambiguity as render it impossible that the deceased did intend to make this provision for the lady in addition to what he had given her before. Surely there is nothing inconsistent on the face of the papers with each other. What is to prevent these papers from operating together? What is there from which the Court can presume that the deceased did intend to substitute one for the other? The only surmise is, that the provision seems large (2000*l.*) and the annuity from the consols. But they are not *ejusdem generis*. There is no reason to suppose it was the deceased's intention, as far as the papers are concerned, to substitute the one of these papers for the other. It is possible that he meant to do so; but it is very possible that he might intend to make an addition to the provision formerly made. I cannot say, however, that upon the face of the instruments I can perceive anything in the nature of doubt and ambiguity sufficient to justify me in admitting parol evidence to show that it was not his intention that the two papers should operate together.

The case, therefore, is very materially distinguished from *Methuen v. Methuen* and *Greenough v. Martin*, they bear in point of fact very remotely on this part of the question. They are not a departure from the principle to be extracted from *Fawcett v. Jones*. I do not think it is necessary to go into the case of *Smith and Blake v. Cunningham*, that turned upon the circumstances in which the codicils were themselves found; though there is a passage in the judgment which is not unimportant, "The intention to revoke must be clear and unequivocal in order to effect their actual revocation,

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all legal presumption being obviously in favor of instruments so prepared and executed."

I consider, therefore, upon the face of these papers there is not such an ambiguity raised as would lead to the inference that it was not the intention of the deceased to give operation to both of them ; supposing, however, that the circumstances were such that the Court could receive this Allegation are the contents of the Allegation such as would satisfy the Court that the two papers were not intended to operate together? (The learned Judge having then considered each of the Articles of the Allegation separately, continued.) If I were at liberty to admit parol evidence in this case, the facts offered in this Allegation are not such as would satisfy the mind of the Court that the papers were not intended to have the effect and operation which *prima facie* they are entitled to, being executed by the deceased and attested by two witnesses and rendered perfect and complete at the time of the death of the testator. I should therefore be of opinion under the old law that this Allegation was not admissible.

The alterations effected by the new statute, it is not necessary to consider ; the new statute is not more favorable to the admission of parol evidence. The statute tends very much to exclude revocation, indeed as to revocations by implication, they are with one exception, that of marriage, entirely swept away, and a subsequent marriage is now an absolute revocation of a previous will.

The Court rejected the Allegation.

The cause subsequently (December 3rd, 1841) came on for hearing upon the evidence of the at-

testing witnesses, when the Court being of opinion that the execution was fully proved, pronounced for the validity of the codicil and directed the costs of the party propounding it to be paid out of the estate.

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*Shadwell's will probated
21st Feb. 1841. Shadwell's
will probated 18th Feb. 1841. I C Shadwell pronounced
in favour of the codicil
March 8. 1841*

In the Goods of JANE SOTHERON, Widow, deceased.

1841.

June 9th.

The testatrix died on the 4th of April last. On the 11th of February, she executed her will in the presence of two witnesses who duly attested it. In the will there was the following clause:—"And I also wish that my executors shall observe the instructions I have left respecting my jewels, trinkets, &c." Prior to the execution of the will the testatrix produced to one of the witnesses, a paper in her handwriting and subscribed by her, dated the 12th of December, 1839, and said it was the paper referred to in her will; and the testatrix at the suggestion of the witness, in order to identify the paper wrote upon it, "These are the instructions referred to in my will as having been left respecting my jewels, trinkets, &c.," and subscribed her name, "J. Sotheron, February 11th, 1841."

Motion for probate of a paper as part of the will, it being referred to in the will and signed by testatrix, rejected, the paper not having been attested by the witnesses nor produced before them.

Curteis prayed probate of the will with this paper as being incorporated therein, it being referred to in the will and identified by the testatrix; there being no other instructions,

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SIR HERBERT JENNER.

June 19th.

In the Goods of
JANE
SOTHEBON.

The statute requires that a will or codicil shall be signed at the foot by the testator, in the presence of two witnesses present at the same time, and that they shall subscribe their names to it in the testator's presence. I am not aware of any case in which it has been held that a paper should form part of a will by merely being referred to in the will. A subsequent codicil duly executed has been considered to be an execution of a prior codicil, it being referred to in that subsequent codicil; although the first codicil had not been attested. But this paper was not produced to the witnesses, and is not attested. I must reject the motion.

1841.

In the Goods of F. B. COLBERG, deceased.

June 19th.

A will being torn into four pieces by the testator, is *prima facie* revoked. The Court will not, on motion, upon an affidavit that the deceased tore the paper in a fit of anger, and did not intend to revoke it, decree probate of such a paper, in the absence of the next of kin.

The deceased left a will dated September 2nd, 1840, with a codicil written on the same paper. The testator, in a moment of irritation, tore the will into four pieces, but afterwards repenting of what he had done, desired his housekeeper to stitch the will together again, saying he did not mean to destroy the will.

Addams prayed probate, submitting that the will was not revoked, the deceased having torn it in a fit of momentary spleen, and not *animo revocandi*, as required by the act.

SIR HERBERT JENNER.

The deceased having torn the will into four

pieces, it must be presumed *prima facie* that he intended to revoke it; if the paper were propounded in an Allegation, and witnesses examined in support of it, I should probably be of opinion that it was not revoked, as in *Doe d. Perkes v. Perkes*; (a) but the Court cannot upon an *ex parte* motion decree probate in the absence of the next of kin.

Upon a proxy of consent from the next of kin, probate may pass.

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June 19th.

In the Goods of
F. B. COLBERG.

CONSISTORY COURT OF LONDON.

BREALY, *falsely called* REED, *against* REED.

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July 22nd.

This was a cause of nullity of marriage by reason of undue publication of banns promoted by Elizabeth Brealy, falsely called Reed, against Robert Charles Reed, her pretended husband.

Nullity of marriage by reason of undue publication of banns pronounced for; both parties being cognizant of the undue publication.

The libel pleaded:—

First.—The statute of the 4th Geo. IV., c. 76, the 2nd, 7th, and 22nd sections.

Second.—The baptism of the man as Robert Charles Reed, on the 19th of July, 1809.

Third.—Exhibited a copy of the entry of the baptism in the register book.

Fourth.—That Elizabeth Brealy, spinster, the party proceeding in the cause, was the only daughter of George Brealy, deceased, and Jane Brealy, his wife, and in the latter end of 1827, and the early

(a) 3 B. & A. 489.

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part of 1828, was residing with her said mother (since deceased) at the house or cottage of John Scott, her second husband, in Bedminster, where the said John Scott carried on his business of a carpenter, and a back-parlour in the said house or cottage was the only sitting-room, and was occupied in common by John Scott and Jane Scott his wife, and the said Elizabeth Brealy, and Harriett Scott her sister by the half-blood, now Harriett Morgan, wife of William Morgan.

Fifth.—That the said Robert Charles Reed in 1827 and 1828 resided with his father, that he was commonly called or was known by the name of Charles, or Charley Reed only, by and amongst his family and friends, and by and amongst the neighbours, friends and acquaintance of his said father and others, and not at all by the name of Robert, which was entirely dormant and disused.

Sixth.—That in 1827 and 1828, the said Robert Charles Reed paid his courtship and addresses to the said Elizabeth Brealy, who was then a spinster of the age of seventeen years, or thereabouts, without the knowledge of his father, with whom he then resided, and upon whom he was solely dependant for his support; that he frequently visited her in the presence of her family in the said back parlour of the house or cottage of the said John Scott; that she agreed to be married to him; that he represented that his marriage with her would be highly displeasing to his father; that thereupon and for the purpose of effecting the marriage clandestinely, and of concealing it from his father, it was concerted and arranged by the said Robert Charles Reed, Elizabeth Brealy, John Scott

and Jane Scott, that the banns for their said marriage should be published in the name of Robert Reed only, and that the name of Charles, by which he was commonly known, should be omitted or suppressed,—that although it was well known by the said Robert Charles Reed, Elizabeth Brealy, John Scott and Jane Scott, that publication of the banns of the said marriage in each of the parishes where the said Robert Charles Reed and Elizabeth Brealy resided respectively was required by law, and that directions to that effect were clearly set forth in the rubric, prefixed to the office of matrimony in the Book of Common Prayer of the Church of England, of which church they the said Robert Charles Reed, Elizabeth Brealy, John Scott and Jane Scott, were members; nevertheless it was further concerted and arranged by them, that the banns of the said marriage should not be published in the parish of St. Nicholas, where the said Robert Charles Reed resided, but that a publication of banns, with the false name as aforesaid, should be made in the parish of Bedminster only. And that because it was well known by the said Robert Charles Reed, Elizabeth Brealy, John Scott and Jane Scott, that if the clergyman who should be required to solemnize matrimony between the said Robert Charles Reed and Elizabeth Brealy in the said parish of Bedminster should know that one of them did not dwell within the said parish, the said clergyman would not solemnize the said marriage unless it should be certified to him by one of the ministers of the parish wherein the said Robert Charles Reed did dwell, that the banns had been thrice asked in the

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said parish where the said Robert Charles Reed did so dwell. Therefore, and in order to deceive the clergyman who should be required to solemnize the said intended marriage, and to prevent his demanding such certificate, and for the purpose of effecting the said intended marriage clandestinely as aforesaid, it was further concerted and arranged by the said Robert Charles Reed, Elizabeth Brealy, John Scott and Jane Scott, that in the notice for the publication of banns which it was necessary to deliver to the minister of the parish where the said marriage was to be solemnized, (Bedminster) it should be falsely stated that the said Robert Charles Reed and the said Elizabeth Brealy did then dwell in one and the said parish, (Bedminster) and not, as the fact was, in divers parishes. That in pursuance of the said preconcert and arrangement, the said Robert Charles Reed caused the banns of marriage to be published in the said parish church of Bedminster for three successive Sundays, &c., between the said Robert Charles Reed and the said Elizabeth Brealy, described therein respectively as Robert Reed, bachelor, and Elizabeth Brealy, spinster. That the said Robert Charles Reed was, as before pleaded, baptized by the names of "Robert Charles," and had constantly and upon all occasions previous thereto, passed and been known by the Christian name of "Charles" only, and not at any time by the name of "Robert;" and that as well before as after the said publication of banns, the said Robert Charles Reed was constantly in the habit of answering when spoken to in the name of Charles only, and so constantly spoke of and described himself, and by no other

Christian name, and had constantly and on all occasions omitted to use the name of Robert in signing his name or otherwise, save on the occasion of the said pretended publication of banns and of the pretended marriage pleaded; and that the said name of "Charles" was knowingly and wilfully suppressed or omitted by the said parties jointly and severally, for the purpose of deception and concealment, and with the intent to effect a clandestine celebration of the said then intended marriage.

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Seventh.—The celebration of the marriage on the 18th of February, 1828, in pursuance of the banns so unduly and illegally published; that the Reverend T. F. Jennings, the minister who performed the ceremony, was and is in the constant habit of inquiring and ascertaining from persons about to be married if the banns have been duly published, and that at the time of or previous to the pretended solemnization of the said marriage, he asked and inquired of the said Robert Charles Reed and Elizabeth Brealy respectively, if their names and residences had been and were truly set forth, or to that effect, and that the said Robert Charles Reed and Elizabeth Brealy then knowingly and wilfully suppressed the said name of "Charles."

Eighth exhibited copies of the entry in the banns-book and in the register-book of marriages.

Ninth pleaded the signatures in the marriage-register to be in the handwriting of the parties in the cause.

Tenth.—That immediately after the pretended marriage, the parties took up their abode in the house or cottage of the said John Scott, and after-

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wards resided in various lodgings; and that the said Robert Charles Reed went and took his meals daily, or frequently, at the house of his father, until he discovered the marriage, when he forbade his son to enter his house, and refused him any pecuniary or other assistance, &c.

Eleventh.—That the said Robert Charles Reed and Elizabeth Brealy, shortly after their said pretended marriage, and during the time they lived and cohabited together as man and wife, jointly and severally, and in each other's presence, frequently declared to Charles Morgan and his wife Mary Ann Morgan, and others, that the said Robert Charles Reed was married in the name of Robert only, and that the banns for the said marriage were published in that name to prevent his father hearing of the said marriage, or declared to that or the like effect, and that the said Robert Charles Reed, within a short period of his marriage, so declared to his said father, or to that effect, &c.

Twelfth.—That in 1832, unhappy differences having arisen between the parties, they ceased to cohabit together, and that in May, 1834, Robert Charles Reed intermarried with another wife; that Elizabeth Brealy was not until 1840 informed or advised that the marriage between her and the said Robert Charles Reed was null and void; that the said Robert Charles Reed frequently confessed that his former marriage was null and void, and when questioned by Harriet Morgan, did distinctly affirm and declare that he never had been legally married to the said Elizabeth Brealy, &c.

The *Thirteenth* and *Fourteenth* were the usual concluding Articles.

Eight witnesses were examined in support of the libel.

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Jenner, for Elizabeth Brealy, submitted that the libel was fully proved, and prayed a sentence of nullity.

No counsel appeared on behalf of Mr. Reed.

JUDGMENT.

DR. LUSHINGTON.

This is a suit brought by the wife, for the purpose of having her marriage pronounced null and void, by reason of the undue publication of banns. The proper names of the husband are "Robert Charles" Reed: but, in the publication of the banns, that of "Charles" was omitted.

Now, there are certain facts in the case which are clearly and distinctly proved; they are the following; First, the marriage itself; secondly, the publication of the banns: for the extract from the banns-book, which is annexed as an Exhibit to the libel, sufficiently establishes this fact; thirdly, that the husband was most usually called and known by the name of "Charles," and never (so far as appears from the evidence) by that of "Robert;" fourthly, that the marriage was clandestine, and clandestine for the purpose of concealing it from the knowledge of the father of the husband, who was in circumstances far superior to those of the wife's family. The last, and by far the most important requisite is, that the undue publication shall have taken place knowingly and wilfully, as relates to both the parties

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to the marriage. I apprehend it is now distinctly stated that this is what the law requires; and as the Court has some reason to believe that a sentence of nullity is desired by both parties, it has a grave duty to perform, in examining the evidence, to be thoroughly satisfied as to the proof on this important point.

The most material witness to this fact, is Mrs. Morgan, the half-sister of Elizabeth Brealy, the wife, and the first circumstance which is calculated to alarm the jealousy of the Court is, that she is deposing to facts which occurred thirteen years ago, she having been only fourteen years of age at the date of the transaction. Now it is certainly somewhat suspicious that, being so young, her memory, after so great a lapse of time, should be so retentive of the species of facts to which she has deposed, as to enable her to recollect precisely what occurred. Her evidence upon the *Sixth* Article, is to the following effect: "On several occasions, before the marriage took place, Mr. Reed, in the presence of my sister, and my father and mother, talked over with them the matter, as to the best way of having it done to prevent it coming to his father's ears. I well remember that Mr. Reed said, that, if the banns were put up in his name of 'Robert' only, he should not be known. I well remember that my sister had always called him 'Charles' up to that time. I also remember that when Mr. Reed urged my father to put up the banns in his (Reed's) name of Robert only,"—I am a little staggered, I confess, at this,—“my father, who is a straight-forward man, made some objections, but my mother being very anxious to have my sister married, he (my father)

was prevailed upon to put the banns up in the names as proposed by Mr. Reed. My sister was present and privy to all the conversations which took place, between Mr. Reed and my father and mother, about getting the banns put up. I myself have heard Mr. Reed ask my father and mother to have the banns put up in his (Reed's) name of 'Robert' only; my sister was present at the time;" fixing the presence of her sister precisely at the moment when it was very important, "she knew that the banns were to be so put up, in order to prevent the said intended marriage coming to the ears of Mr. Reed's father." She gives all these particulars with all this minuteness, deposing that they took place in the presence of her sister; that her sister was privy to all these conversations between Reed and her father and mother, about putting up the banns in this manner, and that the banns were so put up in order to prevent their publication coming to the ears of Mr. Reed's father.

Now supposing the whole of the evidence of this witness to be deserving of credit, the effect of it will be this, that Reed, the husband, for the express purpose of having the marriage solemnized without the knowledge of his father, and to prevent the publication of the banns from coming to the ears of his father, did propose to Scott, his intended father-in-law, that he should leave out the name of "Charles," and that this was not only done by Mr. Reed himself, but done by him in the presence of his wife, so that we have both parties affected with the guilty knowledge. I confess the very strength of this evidence goes a great way not only to excite suspicion in my mind, but to make me doubt its

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verity. But I go to the further evidence as to this fact, namely, the evidence of Mrs. Chettell, for I believe there is no other evidence of the fact.

This witness is a markswoman, she has been examined upon the *Sixth* Article, and she deposes to a conversation which took place thirteen years before, at which Mr. Reed was not present. She says, that on one occasion Mrs. Scott said it was an improper thing for her daughter, Elizabeth Brealy, who was present, to marry a man in the name of "Robert," when his name was "Charles,"—a very improbable thing,—and that such a marriage would not stand. She says, "My mother, I well recollect, said that if she (Elizabeth Brealy) was a child of hers, she would not allow her to marry so. I also remember that Elizabeth Brealy, on the said occasion, jumped up from her chair, and in an angry manner said, that she was determined to have Charles Reed, and that it did not signify if he was married by the name of 'Robert,' because he had promised at some future time to marry her in his own name. Charles Reed was not present when this conversation took place, neither was John Scott present; but I recollect that it was said by Elizabeth Brealy that they should be obliged to be married so, namely, Charles Reed by the name of 'Robert' in order that his father might not hear of it." Here is evidence applying simply to Elizabeth Brealy, and in a very stringent manner, not only to her guilty knowledge, but making her a principal party in the transaction, not very consistent with the testimony of Mrs. Morgan.

Then the case comes to this, that the whole evidence as to the publication of the banns, and as to

the putting up of the banns with the omission of the name of "Charles," with the knowledge and consent of both of the parties, stands upon the testimony of one witness, a girl of fourteen years of age at the time.

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If it stood only so, I confess I should entertain the greatest doubt as to the course I should pursue, and as to the decree I ought to pronounce in this case; because I must not forget that in trying a case of this description, I should not look simply to the circumstances of the individuals in the cause, but also bear in mind that the rights of children may be involved, and that the decree of the Court may determine that they are in a state of illegitimacy; it is therefore highly incumbent upon the Court, in a case of this description, especially where there is reason to suspect that both parties are desirous of having the marriage annulled, to examine with great accuracy and care the whole facts of the case.

There are, in addition to what I have stated, certain declarations of Elizabeth Brealy pleaded in the *Eleventh* Article, that Mr. Reed was married in the name of "Robert" only, in order to conceal the marriage from the knowledge of his father; and Mr. Charles Morgan has been examined on this Article, and deposes to the fact that Mrs. Reed stated that her husband was married to her in the name of "Robert," in order to keep the marriage a secret from his relations; and Mr. Arnould, the uncle of Mr. Reed, states that his nephew told him, in the presence of his wife, that they had been so married in order that his father might not know of it. I place very little confidence in these subse-

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quent declarations, and I think a grave doubt may be entertained whether such subsequent declarations, in a case of this kind, made long after the marriage, are admissible as evidence, because, in these cases, one party or the other might by admissions affect the *status* of other parties, by reason that the interests of the parties in the cause are not confined to themselves, but extend to their children and to the public. The declaration of the wife may by possibility be evidence against the husband, or *vice versa*; but where it affects the children, I doubt whether such declarations could be received.

But there is another part of the case which it is my duty to notice, and it is a most important part, as relates to the publication of the banns; I mean the evidence of the clergyman, which satisfies my mind that the marriage was solemnized with the omission of the name of "Charles," and the entry in the register would satisfy me also of that fact if I had any doubt; and there is equally clear evidence to shew that the banns were put up with the omission of the name of "Charles." Now, how far do these two facts bear upon the question, whether there was a guilty knowledge of the omission of the name? I think they have an important bearing, and so important that, although I do not credit the whole of the evidence of the two witnesses, yet, under all the circumstances of the case,—the clandestinity of the marriage being proved—the constant use of the name of Charles being proved—and all the other facts,—taking the whole of the case together, it seems to me difficult to come to any other conclusion that can be justified by the evidence, than that the omission of the name

of "Charles," wilfully and knowingly, is sufficiently brought home to both the parties; and I, therefore, may pronounce a sentence of nullity of marriage.

1841.

July 22nd.

BRADY
against
REED.

PREROGATIVE COURT OF CANTERBURY.

MENZIES *against* PULBROOK *and* KER.

On Petition.

1841.

August 3rd.

In this case a question was raised whether a creditor has a right to contest the validity of a will and oppose probate passing to the executor.

A creditor has
no right to
oppose a will.

Nicholl and Bayford for the creditor.

Addams and Curteis, contra.

SIR HERBERT JENNER.

The present question comes before the Court by way of petition, to be heard against probate being granted to James Menzies, as executor of the will of Mr. James John Fraser, deceased. He died on the 3rd of June, 1839, leaving Jane Fraser, a sister, his next of kin; shortly after his death, a will was produced, dated September, 1833; a codicil, dated July, 1834, and a second codicil, dated April, 1836, by which his sister was appointed sole executrix and universal legatee; she renounced her right to

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probate, and a meeting of the creditors of the deceased having taken place in Edinburgh, at which Mr. Menzies was present, certain proceedings were adopted, in order to qualify Mr. Alexander Millar to take administration to the deceased's effects, and he was appointed executor *dative quâ* creditor by consent of all parties; he shortly afterwards applied in this Court for administration here; that application was opposed by Mr. Menzies as a creditor. I state these proceedings briefly to shew under what circumstances the question arises; although it is not material to the point now before the Court to do so. These testamentary papers were in the hands of the proctor of Mr. Menzies, but they were withdrawn by him, and a monition was prayed against him (Menzies) to bring them into Court, that monition was served upon Mr. Menzies, but not before he was pronounced in contempt did he produce the papers; he then declared that he proceeded no further in that case, and then produced a subsequent will. The Court was of opinion that Mr. Millar was entitled to his costs, and condemned Menzies in those costs; but no actual dismissal of the parties from that suit took place; the costs, however, were paid and the case was not continued in the books. Menzies was then about to take probate of this latter paper, when *caveats* were entered by Anthony Pulbrook and Thomas Collingwood Ker, creditors of the deceased, who prayed to be heard on their petition against the probate issuing: the Court was inclined to reject their claim to oppose the probate, but granted permission to them, under an intimation that they would do so at the risk of costs.

A long petition has been entered into, whether a part of that petition has been properly introduced, I shall not now stop to consider; the first question is, whether the creditors have established their right to oppose the will? I shall confine myself to that point.

It was admitted, when the application was made, that a very strong feeling was entertained that creditors had no right to contest the validity of a will, and that there were very strong *dicta* to that effect; but it has been contended that there is no direct precedent establishing the point; and that the supposed rule depended upon one single case, that of *Burroughs v. Griffiths* and *Hall*, (a) in which the point was not expressly raised and determined, and that even in that case, in point of fact, the creditor was heard against the will. It certainly did appear to me that this was a novel application, and against the understood rule and practice of the Court; and no case has been cited in which a decision was given in favour of the creditor.

Whatever were the circumstances in the case of *Burroughs v. Griffiths*, both Sir Wm. Wynne and Sir John Nicholl were strongly of opinion that a creditor had no such right. They adopted the rule without any doubt as to its propriety. In *Elme v. Da Costa*, (b) it was contended by Sir Wm. Scott and Dr. Nicholl, that a creditor, when in possession of an administration, might contradict a will, and Mrs. *March's case* was referred to. Dr. Harris and Dr. Swabey on the other side denied that a creditor

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(a) 1 Lee's Cases, 545.

(b) 1 Phill. 173.

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had any right to oppose a will. Sir Wm. Wynne expressed himself to this effect: "The right of a creditor is only this, he cannot be paid his debt till a representation of the deceased is made; he can call on all who have a right to administer; before an administration is granted, if a will be produced, the creditor has no right to contradict or deny it; for if there is a will, or a next of kin claims the administration, then a person offers to make himself a representative, and the creditor gets all that he has a right to." This appears to me to be a very strong expression that a creditor has no right to oppose a will, and that all that he has a right to is that there should be a representation; although this does not expressly determine the point, it is so strong a declaration that the Court would be inclined to adhere to it; and in *Dabbs v. Chisman*, (a) Sir John Nicholl expresses his opinion equally strongly, "a creditor cannot deny an interest or oppose a will." These two cases then, the one in 1791, and the other in 1810, affirm the rule, and the expressions are so strong, that unless there be something to contradict them or to shew that the rule is wrong in principle, the Court would be bound to adopt it.

What then was the case referred to of *Burroughs v. Griffiths*? The case is reported very shortly, and as it is not exactly stated how the question arose, I have had the proceedings in the case looked up; it seems that it was a proceeding to this effect; "a business of proving in solemn form the last will of Mr. James Strangeways, by Samuel Burroughs,

(a) 1 Phill. 155.

the sole executor against Thomas Griffiths, a pretended creditor, and claiming an interest. It certainly does appear in that case that affidavits were exhibited by the creditor against the will, and by the executor in support of it, and *prima facie* it would seem that the creditor had been allowed to impugn the will, but in giving judgment Sir Geo. Lee says, that he heard the counsel for Griffiths as *amicus curiæ*, and not as counsel for a person who had a right to appear, and that the creditor had no right to oppose the will. Now, I cannot think that this case was decided by Sir George Lee without deliberation. It was said, that as Sir George Lee had erroneously held that a creditor had no right under an administration bond, he might upon that ground have held in this case, that the creditor had no right to oppose a will; but still Sir Wm. Wynne and Sir John Nicholl adopted the rule, well knowing that a creditor had a right in an administration bond, and expressly declared that a creditor could not contest a will.

Another case was mentioned in the argument, that of *Newman v. Bourne*, (a) which was referred to by Sir Wm. Wynne in *Elme v. Da Costa*, and he said, that in that case a creditor having an administration decreed, though not under seal, was allowed to oppose a nuncupative will; unfortunately the proceedings in that case cannot be found.

These cases then appear to me to establish the rule of practice as contended for by the counsel for Menzies, and to be precedents which the Court must adhere to, unless the principle on which they

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(a) Cited 1 Phill. 178.

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are founded be shewn to be unsound. Now, some cases (a) were cited in which a creditor has been allowed to contest the right to administration against the next of kin; but in those cases it appeared that the next of kin had no interest in the property, and they do not effect the question before the Court.

I apprehend that a creditor, except by the practice of the Court, has no right to the administration of the estate of a party deceased; he has no right by the statute: he is the appointee of the Court, and I do not know, if circumstances shewed that the creditor was not a proper person, that the Court might not appoint another person.

The rule contended for in this case is founded in reason and sound sense. Sir George Lee says, "if a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense, and delay to executors," and I think much inconvenience; if a creditor has a right to oppose a will, he has an equal right to call in a probate, and put the executor upon proof of the will in solemn form; and if one creditor has this right, every creditor has it; and if a creditor has a right to oppose a will, an executor has a right to oppose the interest of a creditor; and the Court would be called upon to determine questions out of its jurisdiction, whether a debt was barred by the Statute of Limitations; whether the instrument under which the creditor claimed was duly stamped, and various other points. I am therefore clearly of opinion, that the rule which has been acted upon so long ought not to be disturbed.

(a) *Furlonger v. Cox*, 3 Phill. 381. *Bridges v. The Duke of Newcastle*, ibid. *West v. Willby*, 3 Phill. 374.

I do not think, that because a creditor has a right to sue upon an administration bond, he has a right to oppose a will. No case has occurred, in modern times, in which such a claim has been allowed. That a creditor who has obtained a grant of administration may contest a will, without costs, does not affect the question, he is then the appointee of the Court, and defends that character, and does not appear simply as a creditor.

It was stated that, but for the conduct of Mr. Menzies, Mr. Millar would have been in possession of a grant of administration, and that Menzies ought not by his own wrong to be put in a better situation, if Millar had been the party seeking to oppose this will, there would have been some force in the observation, but he does not appear before the Court.

Upon the whole I am of opinion, that this petition ought to be rejected, and without entering into the particulars set forth in the petition, this being a question merely as to the right of a creditor to oppose a will, that Messrs. Pulbrook and Ker ought to be condemned in the costs occasioned to Mr. Menzies.

The Court is not at present in a position to grant probate to Mr. Menzies, there being still an administration outstanding in Scotland, where it would seem the deceased was domiciled, and Mr. Millar being in possession of that administration, has a right here to oppose Mr. Menzies having probate of this will. At present I shall content myself with rejecting this petition with costs.

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—
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In the Goods of ANN SOWERBY, deceased.

1841.

July 8th. -

Administration of the effects of a former wife refused to the representative of a second wife who had taken out administration to her husband, the next of kin of the husband not having been cited.

Ann Sowerby died on the 17th of August, 1806, leaving her husband, Robert Sowerby, surviving. She left property, 1000*l.* South Sea stock, standing in her name. Robert Sowerby married again, and died in May 1830, intestate, leaving his second wife surviving, who was entitled by the custom of London to three-fourths of his property; she took out letters of administration to Robert Sowerby, but died in 1838, leaving the 1000*l.* South Sea stock still standing in the name of the first wife. The executor and residuary legatee of the second wife now prayed administration to the effects of Ann Sowerby, the first wife, without citing the husband's next of kin.

Nicholl. In all cases not within the statute, it is the course of office that the administration should follow the interest; the only excepted case was that of a wife's next of kin, but that is now altered. (a) The second wife in this case was entitled to three-fourths of her husband's property; her representative has, therefore, a much larger interest than the husband's next of kin, who are twenty-four in number; it would lead to much inconvenience if they are to be cited; besides, if a decree be taken out, it ought only to be to shew cause, as the party now applying is entitled to the grant. In *Lovegrove v. Lewis* (b), there was no

(a) See *Fielder v. Hanger*, 3 Hagg. E. R. 769.

(b) 2 Hagg. E. R. App. 154.

citation, nor in *Rees v. Cart* (a), where a caveat had been entered against the grant.

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In the Goods of
ANN SOWERBY.

SIR HERBERT JENNER.

The widow of Robert Sowerby took out administration to her husband, who died intestate; she was then entitled to represent the first wife, Ann Sowerby; her executor can only be entitled to represent the first wife through Robert Sowerby; there must be a representation to Robert Sowerby.

According to the practice of the Court, the representative of the second wife is not entitled to represent the first wife without citing the husband's next of kin, or their renouncing.

My opinion is, that there should be a representative of the husband in the first instance, and then his representative would be entitled to take administration to the first wife. There must be a decree against the husband's next of kin; my impression is, that they are entitled in the first instance.

(a) 2 Hagg. E. R. App. 161.

In the Goods of JOSEPH WILSON, deceased.

1841.

August 3rd.

Addams prayed probate of two papers, of the 21st of January and 5th of February last, as together containing the will of the deceased, under the circumstances stated by the Court.

Motion to supply a legacy omitted by mistake, rejected, the will being perfect and having a clause revoking all former wills.

~~(a) 2 Hagg. E. R. App. 161.~~

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SIR HERBERT JENNER.

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In the Goods of
JOSEPH
WILSON,

The testator, Joseph Wilson, died on the 5th of February, in the present year: on the 20th of January he gave instructions for a will, and that will was executed; he discovered afterwards that a legacy had been omitted, whereupon he directed a codicil to be prepared, but a new will was made, which the testator executed. A codicil was afterwards prepared, which the deceased attempted to execute, but failed to do so through weakness. Then a new will was prepared, but unfortunately the will of the 20th of January was taken as a draught, instead of the second will. It would be extremely difficult for the Court to supply from one paper that which has been revoked by a subsequent paper, for the last will revokes all former wills. Under the present statute the Court cannot supply this omission; I think the Court has no power to do this. I must reject the motion.

1841.

WALKER *against* WALKER.

August 3rd.

Marriage and
the birth of a
child an abso-
lute revocation
of a will, prior
to Jan. 1838.

The testator died on the 3rd of April, 1841. He made a will on the 6th of September, 1834. In July 1837 he married his present widow, by whom he had one child; he also left three children, who were minors, by a former wife.

The *Queen's Advocate* moved for administration to the deceased as dead intestate, to be granted to the widow. He submitted that the will was ab-

solutely revoked by the marriage and birth of a child. It was so held by the Judicial Committee in the case of *Israell v. Rodon*. (a)

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Upon a service of a decree upon the minors in the presence of their guardian, the administration may pass.

(a) 2 Moore, P. C. C. 43, and see *Poe v. Marston*, 1 Curt. 494.

COLLIER *against* RIVAZ.

1841.

August 3rd.

Philip Ryan, the deceased in this case, formerly of Warren Street, Fitzroy Square, but lately of the city of Brussels, died in Brussels, 1829; he left a will and six codicils, four of those codicils were not executed according to the forms required by the law of Belgium, in which country, it was contended, the deceased died domiciled, and those codicils were opposed on that ground. The circumstances of the case are stated in the judgment of the Court.

The *Queen's Advocate* and *Nicholl* argued in support of the codicils, and *Addams* and *Harding* *contra*.

JUDGMENT.

SIR HERBERT JENNER.

This is a question with respect to certain testamentary papers of Mr. Philip Ryan, who died at Brussels in 1829. He left behind him two nieces, Mary Ryan and Mrs. Langebear, a widow, who would have been entitled to his personal estate in

Testator died domiciled in Belgium, he left certain testamentary papers executed not according to the forms required of Belgian subjects; but the law of Belgium, under the particular circumstances of the case, determining the validity of the testamentary instruments according to the laws of testator's own country. The Court pronounced in favour of the papers, they being valid instruments by the law of this country, in which the deceased was previously domiciled.

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case he had died intestate. He left property to the amount of about 20,000*l*. In September, 1824, he executed a will, of which he appointed Mr. V. F. Rivaz, Mary Ryan, and A. H. Rivaz, executors, and his niece, Mary Ryan, residuary legatee ; he also left behind him six codicils, four of which are opposed, upon the ground that they are not executed according to the forms of the law of Belgium, in which country, it was contended, that the deceased was domiciled at the time of his death.

The first question then is, whether or not Mr. Ryan, the testator, was domiciled in Belgium ; it is admitted that if he had not his domicile in that country, the codicils in question are entitled to probate according to the law of England ; on the other hand, it is said, that whether the testator had his domicile in Belgium or not, these codicils are entitled to probate, as executed according to the law, applicable to the circumstances of this particular case in Belgium, although they are not executed according to the forms required from Belgium subjects generally.

Now the history of the deceased is briefly as follows.—He was born at Clonmell in Ireland ; in 1762, he entered into the British navy, in which he continued to serve until 1780. In 1776, he married at Rochester, and his wife died about 1802. The deceased was engaged in business as a dealer in foreign cambrics, and, in consequence of that business, was frequently in the habit of resorting to different places on the Continent for the purposes of that trade, but his principal residence was in this country, where he had a house in Warren

Street, Fitzroy Square, which he sold in 1802. There could then be no doubt that up to this time he had abandoned his original Irish domicile, and had acquired one in England. In 1802, he went to Brussels for the purpose of residing there, as is stated by him in a codicil before the Court, dated the 24th of September, 1825; in 1803, the war between England and France being renewed, the deceased was detained as a prisoner; in 1814 he came to England, and remained here for a few months; he afterwards returned to Brussels, and continued to reside there until his death, with occasional excursions on matters of business or pleasure. It also appears that in early life, he had adopted his niece, Mary Ryan, and she went to live with him at Brussels, and continued to reside with him until his death.

I cannot think it necessary to go at any length into the facts of the case, because they are all admitted; there is no dispute as to them, the only question is as to the result of them. Now, I cannot but think that all the facts, with respect to the abandonment of the old domicile and the acquisition of a new one, indicate not only an intention to reside at Brussels, and make that place his home, but that the fact and intention concur together, which is all that is necessary to constitute a domicile. Length of time will not alone do it, intention alone will not do, but the two taken together do constitute a change of domicile. No particular time is required, but when the two circumstances of actual residence and intentional residence concur, there it is that a change of domicile is effected. In this

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case I can have no doubt, from the facts, that this was the deceased's selected place of domicile ; though from 1803 to 1814 it was a forced residence, yet from that time, 1814, he became habituated to the manners of Brussels and the inhabitants of Brussels, and preferred to make his continental residence in that place to a return to his original domicile. I am, therefore, of opinion, under the whole circumstances of the case, that the testator must be considered to have been domiciled at Brussels at the time of his death.

The question however remains to be determined, whether these codicils which are opposed are executed in such a form as would entitle them to the sanction of the Court which has to pronounce on the validity of testamentary dispositions in Belgium, in the circumstances under which they have been executed. Because it does not follow, that Mr. Ryan, being a domiciled subject of Belgium, he is therefore necessarily subject to all the forms which the law of Belgium requires from its own native born subjects. I apprehend there can be no doubt that every nation has a right to say under what circumstances it will permit a disposition, or contracts of whatever nature they may be, to be entered into by persons who are not native born, but who have become subjects from continued residence ; that is, foreigners who come to reside under certain circumstances without obtaining from certain authorities those full rights which are necessary to constitute an actual Belgian subject. Every nation has a right to say how far the general law shall apply to its own born subjects, and the subject of another

country ; and the Court sitting here to determine it, must consider itself sitting in Belgium under the particular circumstances of the case.

Now three witnesses have been examined with respect to the law of Belgium, as applying as well to the acquiring of a domicile in Belgium as to the law with respect to the execution of testamentary instruments.

With respect to domicile acquired, it is quite clear, according to the evidence of these persons, that no domicile according to the law of Belgium can be acquired unless the authority of the ruling powers is obtained to authorize the persons who apply for that authority to continue in that country ; that unless that authority is obtained he is liable to be removed at any time ; that having obtained that authority he then becomes to all intents and purposes a subject of Belgium, and has a right to remain there and enjoy the privileges of a natural born subject. But it may be a different question, whether a person who has not obtained that authority, a mere resident there, is to be considered as a foreigner simply having a residence and not a domicile. I think it is very doubtful whether the Dutch and Belgian lawyers understand the same thing—from the evidence given with respect to domicile—whether they do not consider that a person to become domiciled, must have denization, that which is equivalent to our naturalisation, and they do not mean simply domicile for the purpose of succession or anything of that description, but they consider that a person in order to become domiciled must place himself by the authority of the government in the same situation as a Belgian sub-

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ject, and have the rights and privileges of that country. But I think it is not necessary to inquire into this, because I think we have the conclusive evidence of two witnesses as to that which is necessary to give validity to the testamentary dispositions of persons who reside there, but have not acquired all the rights of Belgian subjects.

The first of these witnesses is Dr. Schooneveld. He describes himself as a doctor of laws and advocate at the High Court of the Netherlands, residing at the Hague. He is qualified to depose to what is required to give validity to testamentary dispositions executed by persons in the situation in which Mr. Ryan appears to have been. He states that "the law which was in force in Belgium and Holland from the year 1815, till the Revolution in 1830, was the French Code Napoleon. That according to that code, foreigners who obtained from the King the authority to establish their domicile in the Netherlands, could and did enjoy all civil rights so long as they continued to reside there; that therefore on the contrary foreigners not admitted by the aforesaid authority of the King, could not acquire a domicile for the exercise or enjoyment of the full civil rights." He deposes also, "that such a foreigner, when in addition thereto, he has not made his positive declaration at the municipality of the place at which he took up his abode that he was willing and desirous to fix his residence in such place, and to transfer his domicile thereto, he is considered to have only a residence but not a domicile there." The declaration being, he means to make a particular place his residence. It is not necessary in order to give him authority

to reside in Belgium or in Holland, that he should give any declaration before the magistrates; that only goes to the particular place which he means to make his domicile. He goes on to depose, "that the Code Napoleon, in its dispositions respecting domicile, has reference only to natural born subjects, and not to foreigners, the latter being commonly considered to have a residence only, and whose successions must consequently be governed by the laws of their own country." Then if this is the law of Belgium; if the succession with regard to such persons who came to reside in Belgium as Mr. Ryan did is governed by the laws of their own country; then the law of his own country being followed by Mr. Ryan, these codicils are entitled to probate.

Dr. Schooneveld also deposes, "that the mere fact of residence would not render such a person's succession subject to the law of Holland, and which law was in force in Belgium, during the period of its union with that country." Another gentleman has been examined, who deposes pretty much to the same effect, he says, "that as long as Belgium was united with Holland, that is to say, from 1815 till the year 1830, the French Code Napoleon was the common law in force in the United Kingdom. That according to that law, a foreigner who had obtained the authority of the King to establish his domicile in the kingdom, enjoyed all the civil rights so long as he continued to reside in it. That by such law in force during that period, foreigners who have not obtained the authority of the King as above mentioned," which is the case with Mr. Ryan, "were unable, that is, incompetent to exercise the

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full civil rights, particularly if they had not expressly declared at the municipality of the place where they had decided to reside, that they had fixed their residence in such place with the intention of transferring their domicile, and of establishing themselves there; but such persons continued to be foreigners although they lived there several years, and even to their deaths they were considered to have only a residence. That the disposals of the code in force at the above-mentioned period respecting domicile refer to the domicile of natives and not to foreigners, who by merely residing in the United Kingdom of the Netherlands"—that is, who reside in the Netherlands without having obtained royal authority so to do—"did not lose their domicile of origin, and their successions consequently were not subject to the law of that country." This witness, as the former, makes his deposition from his opinion and construction of the law as acquired by a practical knowledge thereof in his capacity of an advocate.

Then according to the opinion of these gentlemen, well skilled in the practical application of the Code Napoleon and its dispositions, and which was the law in force in Belgium up to the year 1830, when the separation of the two countries took place, and consequently at the time at which these testamentary documents of Mr. Ryan were executed, they do not consider that Mr. Ryan, as a foreigner, was bound by the requisites of the law of Belgium, as to the form and execution of a will, as would necessarily be the case with a free, natural born, subject of Belgium; but the successions of persons who, however long they might have been resident,

not having obtained the royal authority to reside there, being considered as mere foreigners, would be governed by the laws of their own country, and would be upheld by the Courts of Belgium, if those Courts were called on to decide. The Court sitting here decides from the evidence of persons skilled in that law, and decides as it would if sitting in Belgium.

Therefore I am of opinion, that notwithstanding the domicile of Mr. Ryan must be considered to have been in Belgium, and that he had in point of law abandoned his original domicile, and had acquired *animo et facto* a domicile in a foreign country, yet that foreign country in which he was so domiciled would uphold his testamentary disposition, if executed according to the forms required by his own country. I am therefore of opinion, that I am bound to decree probate of the will and all the codicils. And I decree the costs of all parties to be paid out of the estate.

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Nov. 6th.

Motion:
Will Act.

In the Goods of MARY HARRISON, deceased.

Mary Harrison, late of Jermyn Street, Saint James's, spinster, a milliner and dressmaker, died on the 28th of September, 1841. In the morning of the 22nd or 23rd of that month, she went into a room where Mary Panniers, Mary Godwin, and Janet J. Kay, persons in her employ, were at work, with a paper in her hand, and obtained their signa-

Probate refused of a paper produced by the deceased to three witnesses who subscribed their names thereto, two of the witnesses not seeing the signature to the paper nor knowing that it

was signed, the third witness deposing that she saw the signature of the deceased.

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HARRISON.

tures as witnesses thereto, but did not state to them that such paper was her will, nor did she sign it in their presence, or acknowledge the signature thereto, if even there was any. Shortly after the paper had been thus witnessed, the deceased on the same day, with another paper in her hand, again came into the room where the same three persons were still at work, and going first to Mary Panniers, desired her to write her name at the bottom of the paper, stating, at the same time, that she required her to sign her name to that paper, in consequence of having written her name crooked to the former one. The deceased then took the said paper to Mary Godwin and Janet J. Kay, and desired them to sign their names to it, which they accordingly did. The deceased then left the room, and took the paper away with her. When the deceased presented the last paper to the witnesses for their signatures, she placed it on the table, folded up so as to present to their view the bottom part thereof, and neither of them recollected to have seen any of the writing except Mary Godwin, who stated that she observed the deceased's signature immediately above that of Mary Panniers. The paper was in the deceased's handwriting.

Jenner prayed probate upon an affidavit of the above circumstances from the three witnesses.

SIR HERBERT JENNER.

Under the circumstances stated, it is quite clear that the signature to this paper was not made in the presence of the witnesses; the question then is, was it acknowledged in their presence; it appears

to me that it was not. Suppose Mary Godwin saw the name, the other witnesses depose that they did not see it; can this then be a sufficient acknowledgment of the signature to two witnesses present at the same time? I am of opinion that it cannot: the Court cannot on motion decree probate of this paper, I therefore reject the motion.

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MARY
HARRISON.

In the goods of G. L. OLDING, deceased.

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Haggard prayed probate of the will of the deceased, under the following circumstances. On the 18th of September, 1841, the two attesting witnesses being both present, the deceased took up the will (which had been previously written by his wife from his own dictation), and read the same all over aloud, in the hearing of those present, and having so done, requested the witnesses to attest the same, telling them that they had better sign their names at full length. They thereupon subscribed their names to the will in the presence of the deceased, *after* which he signed his name at the foot or end thereof, in their presence.

Motion for probate of a will, signed by the testator *after* the witnesses had subscribed their names, rejected.

SIR HERBERT JENNER.

Is the paper a will before it is signed by the testator? A party signs his name after the attestation of the witnesses, although in their presence: my present impression is, that this is not a compliance with the statute.

I shall reject the motion for probate, without giving any opinion.

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MACKENZIE *against* YEO.

Motion that certain writings should be produced which were referred to by a witness in his deposition, such witness being the solicitor of the party in the cause opposing a codicil, resisted on the ground of privilege; *held*:

First, that information collected by the solicitor from a subscribed witness to the codicil is not privileged: *semble* it would be otherwise if collected by the client and communicated to the solicitor.

Second, that letters written to the principal solicitor by another solicitor, also employed by the client to collect evidence in the matter, and with directions to communicate it to the principal solicitor, are privileged.

Third, that letters written by the testator

to his solicitor with regard to a bond executed by testator in favour of the party propounding the codicil, are not privileged communications as between the solicitor and the executor opposing the codicil, by whom he was also employed as his solicitor in this matter.

This was a cause of proving a codicil to the will of G. A. Barbor, Esq., deceased. At the commencement of the argument,

The *Queen's Advocate* and *Addams* prayed the Court to direct certain writings referred to in his deposition by Mr. Thomas Hooper Law, the solicitor of Dr. Yeo, party in the cause, to be produced. This application was opposed by *Haggard* and *Jenner* for Dr. Yeo.

SIR HERBERT JENNER.

In this case a question has been raised by the counsel for Mrs. Mackenzie, who is a legatee in 5,000*l.*, by the codicil, the subject of the suit, and it is said that I ought to direct certain paper writings referred to in the depositions of the solicitor of Dr. Yeo, the other party in the cause, to be produced. I am prayed to suspend the proceedings in the cause until the order prayed shall have been complied with. This motion was resisted on behalf of Dr. Yeo, and the point has been argued by counsel on both sides, and the Court has now to give its decision upon it.

The papers referred to may be classed under three heads:

First.—Two letters in the handwriting of the testator in the cause directed to Mr. Hooper Law,

the witness, and they refer to a bond to a person now Mrs. Mackenzie.

Secondly.—Two letters received from a Mr. Turner, a solicitor in Exeter, by Mr. Law, and

Thirdly.—A memorandum in writing taken by Mr. Law of a communication of a witness who is one of the subscribing witnesses to this codicil.

These papers, thus classed, are said to be open to one common objection against their production, for it is said that they are all of them confidential communications between Dr. Yeo, and his solicitor, Mr. Law, and as such privileged communications, which Mr. Law ought not to be called upon to disclose, which he is bound not to disclose, and which in point of fact the Court ought not to suffer to be produced, had Mr. Law been inclined to do so. That is the first and principal ground of objection taken to the prayer of Mrs. Mackenzie's proctor.

As a general principle, a solicitor ought not to disclose what has been confidentially communicated to him as solicitor. In Mr. Phillipps's book on Evidence, the rule is thus stated: "Confidential communications between attorney and client are not to be revealed at any period of time,—not in an action between third persons,—nor after the proceedings to which they referred are at an end,—nor after the dismissal of the attorney. The privilege of not being examined to such points as have been communicated to the attorney while engaged in his professional capacity, is the privilege of the client, not of the attorney, and it never ceases." (a)

Now this being the general position, which seems

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(a) Phillipps on Evidence, vol. i. p. 139, 5th edition.

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not to be denied, the only question which arises is, whether the circumstance being attended to, these are communications of such a nature as bring them within the privilege. Particular communications are under no circumstances to be divulged, but a solicitor is bound to disclose some facts come to his knowledge collaterally.

The rule has been acted upon with some qualification; a solicitor cannot refuse to answer questions which have come to his knowledge collaterally and not confidentially, or from other quarters. So, if he has made himself a party to the transaction, or if he has made himself a witness to a deed which any other person might equally well have witnessed, the witnessing the execution of a deed being no part of the duty of a solicitor.

Now it is impossible to lay down any general rule as to the extent of the privilege. The cases have turned on very nice distinctions. Lord Cottenham, in the case of *Desborough v Rawlins*, (a) says, "I do not think that it is necessary that I should now lay down any rule as to the length to which the privilege should extend. It would not be easy to do so consistently with the cases, but I am to consider whether the defendant clearly brings himself within the privilege; for a defendant who relies upon the privilege is undoubtedly bound to bring himself clearly and distinctly within it." That was a case where a bill had been filed by the insurers of a life against the insured, and to which the solicitor of the insured was made a defendant, and it stated, that on a particular day the insured

(a) 3 Myln & Cr. 515, 519.

had been informed that the life in question was bad, and that the solicitor was present at the communication. The Lord Chancellor was of opinion that the solicitor was, in that case, bound to divulge what had taken place. His Lordship being of opinion that the communication was not privileged, and that divulging it was not a breach of professional confidence. The same observations were made by Lord Chancellor Brougham in the case of *Greenhough v. Gaskell*. (a) The general result of that case is, that a solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge in the conduct of professional business for a client, even though such business has no reference to legal proceedings either existing or in contemplation. Lord Brougham says, "No authority sanctions the violation of professional confidence which would be involved in compelling counsel or attorneys to disclose matters committed to them in their professional capacity, and which, but for their employment as professional men, they would not have become possessed of." In that case the question was, whether the privilege extended to communications made before legal proceedings were actually commenced; the Lord Chancellor considers that question, and states the result, "as regards them, the counsel and attorney, it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation. If, touching matters that come within the ordinary scope of professional employments, they receive a communication in their

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professional capacity, either from a client or on his own account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any Court of law or equity, either as a party or as witness. If this protection were confined to cases where proceedings had commenced, the rule would exclude the most confidential, and it may be the most important of all communications; those made with a view of being prepared either for instituting or defending a suit up to the instant of the process of the Court issued."

An attorney is not to disclose what has come to his knowledge solely in his professional capacity immediately from his client, or immediately from his connection with his client. I take that to be the result of all the cases.

Where an attorney directly or immediately derives information from his client, that is a privileged communication, and the object of the rule being to conceal secret communications, the privilege applies, but to bring his case within the rule, the matters communicated must have come directly or immediately from the client, for if the facts come collaterally from another person, the attorney will be bound to answer.

It remains to be considered whether the circumstances of this case bring it within the rule. Look-

ing at these several papers, I propose to invert their order, and to consider the first class the last. Now the first class I shall consider, is the paper or the memorandum of the communication from the witness Lake ; Mr. Law, acting as solicitor of Dr. Yeo, makes inquiries, and takes down the result of the communication between himself and the witness, who is one of the subscribing witnesses to the codicil. This communication took place before actual proceedings had commenced. It is a communication made under the circumstances stated in answer to the twenty-eighth interrogatory addressed to the witness Law, who has been examined on the Allegation given in by Dr. Yeo, and who appears to have been the confidential solicitor of the testator in the cause, and of Dr. Yeo the party in the cause.

(The learned Judge here read the twenty-eighth interrogatory (a) and the answer of the witness to

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(a) Twenty-eighth interrogatory.

What interviews, and when and where, have you had with George Lake, one of the subscribed witnesses to the codicil in question in this cause? What was the purport of your interview or interviews with him? What transpired between you and him on the occasion or occasions of such interview or interviews? Set forth the same most specifically, and if possible *verbatim*? Did you take down any examination of the said George Lake in writing? If yea, obtain the same and annex it to your deposition, &c.

The answer of the witness :

I have had only one interview with George Lake, the object was to inquire of him all that he knew respecting the codicil. It was on the 17th of December, at Exeter. I have a memorandum of what passed on that occasion, and from that better than from recollection, I could state what passed between George Lake and myself; but I doubt if it would be right in me either to give up the document or state its contents, since it belongs to my client. I acted as his solicitor on that occasion.

The witness was then told that the production of the paper was called for on the part of the ministrant by her proctor. " That I do

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it, and continued.) The witness then objects to the production of this paper; he was at this time acting as the solicitor of Dr. Yeo as he states, and that he went to one of the subscribing witnesses previous to the commencement of the proceedings, but relating to the investigation in the cause, but he declines to set forth what passed on that examination, or to deliver up the paper or memorandum; and the question is, whether, under the circumstances, this is a privileged communication which he is not at liberty to divulge, because it would be a breach of professional confidence?

I have great difficulty in holding this to be a professional communication. It is true, Law was acting as solicitor of Dr. Yeo, and he asks a witness what passed on a certain occasion, but that is no communication between Dr. Yeo and Law. If Dr. Yeo had himself asked the witness a question, and then communicated the answer to Law, that would be a privileged communication; but, as held by Lord Cottenham, in *Desborough v. Rawlins*, it is not enough that it comes to the knowledge of Law in a conversation between himself and the witness; it is no breach of confidence as between the witness and Law. The information is for a collateral point, and I think it is not a privileged communication, but that Law might be called upon to divulge it. There is no confidence between him and his client in this matter.

not consider to be enough; if called for on the authority of the Court, I should consider myself bound to comply. Being now told by the examiner that I ought not to withhold the paper, I give it up, subject to any order of the Court respecting it, and that he takes upon himself the responsibility of requiring its production."

This paper has been annexed to Law's deposition, and has been brought in, subject to any observations that may be made upon it; but I think there is a still more serious objection which may be made to its production, namely, that if produced, the parties could make no use of it. It is clear, on all the authorities, that the testimony of a witness may be impeached, by shewing that he has made statements out of Court different to what he has deposed on the trial, yet on all points it is clear that this declaration could not be attended to in evidence,—it is no evidence at all. If Law had been called on to depose that the witness Lake had made statements out of Court contrary to his deposition in Court, this paper might be material; but I am of opinion that, further than this, if this paper was disclosed in evidence, it would form no part of the testimony of Lake.

I am asked to stop the hearing of this cause until this paper is produced. The Court would not be inclined to do so, especially as the parties have all the benefit they could have from the production of it. Law has been examined, and has been called on to state all that passed between him and the witness Lake; he has set forth no contradictory evidence to Lake's testimony, and the parties have the benefit of the presumption that what Lake has stated is conformable to the evidence he has given. With respect to that paper I am of opinion that it is not to be opened for the further examination of Law.

The next class of papers are two letters written to Law, and they are referred to in the sixty-third interrogatory. (The Court read the interrogatory

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and the answer.) (a) Therefore this witness states that Turner made inquiries, but he declines to give up the letters received from Turner, inasmuch as they are confidential communications which he is privileged not to part with, but to withhold.

These letters are very differently circumstanced, and I think they do come within the principle of privileged communications. Dr. Yeo employs Law generally; he also employs Turner, with direction to communicate with Law. Turner does inquire, and does communicate with Law; therefore I think these are privileged communications from the client to Law, acting in a professional capacity, through

(a) Sixty-third interrogatory.

Let William Law and Thomas Hooper Law be asked, upon your oath have you not, or to your knowledge and belief has not the producent employed a Mr. Turner, an attorney at Exeter, to examine some person or persons at that city touching some pretended or alleged declaration or declarations of George Lake, one of the subscribed witnesses to the codicil in question in this cause? Has not the said Mr. Turner had an interview with a person named James Gilbard on such subject? Also with a person named William Cornish, and also with a person named Evans? or with all, some or one of such persons, and whom? Have you not received some letter or letters, or some statement or statements in writing from the said Mr. Turner in respect thereto? If yea, obtain and annex the same to your deposition."

Answer of Mr. Thomas Hooper Law.

"Mr. Charles Henry Turner, of Exeter, attorney at law, was, I believe, consulted by the producent, and employed by him to make some inquiries in Exeter touching the boy George Lake, and to communicate with me, if he saw occasion so to do, the object being only an investigation of the circumstances of the case, and to ascertain, if possible, the truth of it. I received some letters, three or four as I recollect from Mr. Turner on the subject, but I cannot consent to give them up: I have no right to part with them. I do not remember the name of Gilbard, those of Clampitt, Cornish, and Evans, were I think mentioned in the letters of Mr. Turner. I submit that what I have done in my professional character as solicitor of the producent is not a proper subject of inquiry."

the medium of Turner, who was also acting in a professional capacity. The Court cannot conceive a case where stronger circumstances could be brought forward against the production.

These are communications from Dr. Yeo to one solicitor through another solicitor, whom he also employed. The witness is not bound to produce letters or to divulge the contents of them, being communications made by a certain person professionally employed to another person also professionally employed. I am of opinion they come within the privilege, and that the parties are not at liberty to have the letters brought in.

The remaining papers are two notes written by the deceased in the cause to Mr. Law, as to the preparation of a bond. (The Court read the fifteenth interrogatory and the answer.) (a)

(a) The fifteenth interrogatory (so much as related to this point was as follows :)

“ Was not the testator much attached to the ministrant? Did he not so express himself to you? Was he not most reluctant to part with her? Did the testator ever write to you on the subject of his intimacy, connection with, or attachment to the ministrant? If yea produce the letters to the examiner to be annexed to your deposition, and at the same time solemnly swear that the letters you have produced are the whole you ever received on that subject, or that you can now obtain.”

The answer of the witness (to that part of the interrogatory :)

“ He expressed himself in favourable terms of her; I do not think that he was reluctant to part with her. I do not think that latterly he had been much with her. The only letters or notes that I ever received from him having any reference whatever to her were the two notes already alluded to, and they are not in my possession now. They were merely to apprise me that he was coming to me on the business of making a settlement on Miss Melton. The first was dated on the Sunday, mentioning that he would call the next day. The second was written at my office, as I suppose, and left for me, because of my not having received the other. I was from home when he called.”

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Now this can hardly be considered a confidential communication between Dr. Yeo and Law; it might have been so as between the deceased and Law, but as between Dr. Yeo and Law it was no confidential communication; I should consider these notes as papers not privileged to be withheld, but in point of fact my decision is not called for, because Law has been called on to state what passed on the instructions for the preparation of the bond, and what passed after the preparation; and he has been cross-examined, and has, very properly, been called on to communicate what passed on the subject. I think the privilege of the client would be held to have been waived, even if this had been a privileged communication. A witness may be cross-examined as to all facts on which he has been examined; but the answer to this is, that Law has not these notes in his possession, which is a sufficient answer; he has stated what the contents of these letters are.

Under these circumstances I think the answer is sufficient, and that I cannot compel Law to go to persons in whose possession these letters are, if they are in existence.

I reject the prayer of Mrs. Mackenzie's proctor, and direct the cause to proceed.

CONSISTORY COURT OF LONDON.

VARTY and MOPSEY against NUNN.

On the admission of an Allegation.

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This was a question as to the admission of an Allegation by way of defence to a libel in a suit for subtraction of church-rate, brought by the churchwardens of the parish of St. John, Hackney, against William Nunn, the amount sued for was three shillings and four-pence.

The Allegation which now stood for admission pleaded,—

First.—That in or about the year 1763, it was considered expedient to enlarge the then existing churchyard of the ancient parish of St. John, Hackney; that, accordingly, a piece of copyhold land was purchased with certain monies, forming part of a fund known in the said parishes as the “unappropriated fund,” and which was created by means of fines imposed on persons in lieu of their serving certain offices in the said parish. That the said piece of land was subsequently duly consecrated by the Bishop of London, and thereupon became the usual burial place of the said parish, the old burial ground being afterwards but seldom resorted to, that both before and subsequently to the consecration of the said additional burial

An allegation rejected, pleading in objection to a church-rate, that the rate should have been made by certain trustees under a local act, 30 Geo. 3, c. 71, and not by the churchwardens of the parish (St. John's, Hackney); that the rate ought to have extended over the whole ancient parish of Hackney, and not to be confined to the distinct parish of St. John, Hackney, (construction of Church Building Acts); that the churchwardens were not duly elected, no notice having been given in the original parish.

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ground, the churchwardens of the said parish were accustomed to receive certain dues and duties at funerals or interments of the dead, for the use of the ground in the church and churchyard of the said ancient parish of St. John, and for tolling a funeral bell in the said church. And this, &c. &c.

Second.—That the present parish church of the said ancient parish of St. John at Hackney, was erected under the provisions of a certain act of Parliament, passed in the thirtieth year of the reign of George III., entitled, “An Act for taking down the Church and Tower belonging to the parish of St. John at Hackney, in the county of Middlesex, and for building another Church and Tower for the use of the said parish, and for making an additional Cemetery or Churchyard;” and that in order to build and complete the said parish church, and to provide the said additional burial ground, the said ancient parish of St. John at Hackney was assessed to the amount of 25,000*l.*, or thereabouts, and the said sum was raised by means of certain annuities granted, and rates raised under the provisions of the said act, and of two other acts, passed in the 35th and 43rd years of the reign of Geo. III. respectively, as in and by the said three several acts of Parliament, to which the party proponent craves leave to refer, doth more fully appear, and the party proponent doth expressly allege the said acts to be public acts. And this, &c.

Third.—That the said rates still continue to be raised under the provisions of the aforesaid acts of Parliament, several of the said annuities being still unexpired, and that the said rates being raised

throughout the whole of the said ancient parish of St. John at the present time, amount annually to the sum of 700*l.*, or thereabouts. That by the aforesaid act of the 30th Geo. III. it is enacted, that during the continuance of the said rates, the then new intended church and churchyard, together with all buildings, bells, pews, seats, and all goods, chattels and ornaments thereunto belonging or appertaining, and the roads, avenues, and passages thereto shall vest in the trustees appointed under the said act, and that at and from the ceasing of the said rates, the fee simple of the same shall vest in the vicar and churchwardens of the said parish for the time being, &c.

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Fourth.—That by the 23rd section of the said act it is recited to the effect following, *viz.*, “that the churchwardens of the said parish (to wit, of the said ancient parish of St. John at Hackney,) had received certain accustomed dues and duties at funerals or interments of the dead, for the use of the ground in the then existing church or churchyard, and for tolling a funeral bell in the said church, the same being the dues and duties hereinbefore mentioned,” and it is thereby enacted, “that the said churchwardens shall continue to demand, take, and receive such and the same dues and duties at funerals or interments of the dead in the said new church and churchyard, and for tolling a funeral bell in the said new church, which dues and duties, when received, shall be applied by the said churchwardens in aid of the church-rate of the said parish,” &c.

Fifth.—That on or about the 25th of July, 1840, a certain meeting was held in the vestry-

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room of the parish church of Hackney, with the privity and sanction of the said William Varty and Robert Mopsey, styling themselves the churchwardens of the said parish, when a committee consisting of eight persons was appointed to inquire into the nature and extent of the above mentioned dues and duties; that the said persons met together frequently to ascertain the same, and that such inquiry was conducted with the assistance and co-operation of the said Varty and Mopsey; that the result of such inquiry was published in a printed report circulated through the said parish, with the concurrence of the said meeting, styling themselves the vestry of the said parish," &c.

Sixth. — That in part supply of proof, &c., annexed one of the said printed circulars.

Seventh. — That the said dues and duties mentioned in the said act of Parliament, or contemplated thereby, or dues and duties similar thereunto have been from time to time raised and collected since the passing of the said act, and that a large annual amount hath from time to time been realized, to wit, in respect of the use of the said burial ground, to the annual amount of £. or thereabouts, and in respect of tolling the bell, to the annual amount of 75£. or thereabouts, but that the said dues and duties arising from the use of the said burial ground are not applied in aid of the church-rate of the said parish as directed by the said act of Parliament, &c.

Eighth. — That under the provisions of the acts 58th and 59th Geo. III. and certain other acts, usually designated as the Church Building Acts, two new parish churches were built within the

limits of the said ancient parish of St. John's at Hackney, and that under the provisions of the said acts, and by an instrument under the seal of his Majesty's commissioners for building new churches, duly enrolled in the High Court of Chancery, and entered in the Registry of this Court, and bearing date 6th August, 1824, the same having been made in pursuance of an order in Council, bearing date the 10th of March in the same year, the said ancient parish of St. John, Hackney, was divided into three separate and distinct parishes for ecclesiastical purposes, to be called severally the Rectory of Hackney, the Rectory of South Hackney, and the Rectory of West Hackney; that notwithstanding the aforesaid divisions of the said ancient parish, the same, according to the provisions of the said acts of Parliament, is but one parish, in respect of "any poor or other parochial rates to be raised in the said parish, or to the maintenance or relief of poor persons, or to any title or claim to such relief or to any powers relating to such rates, or holding vestries, or appointments or powers of parish officers, or any such relief or claim thereto, or to any act or acts of Parliament, or law or custom relating thereto, save and except as to church-rates in so far as the same are regulated by the provisions of the said acts;" that since the division of the said ancient parish of St. John, the parishioners of the said three parishes, viz., Hackney, South Hackney, and West Hackney, have severally from time to time elected their own churchwardens; that the churchwardens of the said ancient parish of St. John are, in virtue of their appointment,

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and under the provisions of a public act of Parliament, 4 Geo. 3, and entitled, "An Act for maintaining, regulating, and employing the poor within the parish of St. John at Hackney, in the county of Middlesex, and for lighting the said parish and establishing a regular nightly watch therein," appointed trustees for the purpose of carrying into effect the provisions of the said act, and as such, are empowered to make certain rates for the lighting and watching the whole of the said ancient parish of St. John; that by the said act, 30 Geo. 3, the said churchwardens are also, in virtue of their office, appointed trustees of the funds to be raised under the said act for building the then intended new church of St. John, and as such are authorized to make and levy certain rates, throughout the whole ancient parish of St. John, in order to raise the funds necessary for carrying into effect the provisions of the said act; that by another public act, 50 Geo. 3, entitled, "An act to alter and amend the powers of so much of an act passed in the fourth year of his present Majesty as relates to the maintaining, regulating, and employing the poor within the parish of St. John at Hackney, in the county of Middlesex," the said churchwardens are also appointed trustees of the poor throughout the whole of the said ancient parish of St. John, and as such are authorized by means of rates to levy any sum or sums necessary for the maintenance and relief of the poor throughout the said ancient parish; that notwithstanding the premises, the said trusts have been executed solely by the churchwardens for the modern parish of Hackney, distinctively so called, and that previously to the pretended election and appointment

of the said W. Varty and R. Mopsey to be churchwardens, and previously to the holding of the pretended vestry meeting for making the rate libellate in this cause, no notice whatever of such intended election or of such intended vestry meeting was given to the parishioners of South and West Hackney, by affixing the same upon the doors of the churches or chapels within the said two parishes or otherwise, and that none of the parishioners in the said two parishes did in fact attend or vote on such occasions, nor were offered the opportunity of attending and voting," &c.

Ninth.—That at the pretended vestry meeting held on the 23rd of July, 1840, at which the pretended rate was made, the said W. V. and R. M. calling themselves the churchwardens of the said parish of Hackney, laid before the said meeting a certain statement of account purporting to be an estimate of the money necessary to be raised for the current expenses of the churchwardens of the parish of Hackney for the then ensuing year. That the said estimate was signed by the said W. V. and R. M. in their assumed character of churchwardens, and the party proponent, &c. doth annex a certain paper, &c., and doth allege it to be a true copy of the said estimate. That the said estimate is excessive, that no credit is therein given for certain monies which are directed under the aforesaid acts of Parliament, or some of them, to be collected and applied in aid of the church-rate, and that it contains certain charges which under the said acts ought not to be included in the said rate, &c.

Tenth.—That under the provisions of a certain act of Parliament passed in the 50 Geo. 3, and

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pleaded in the *Seventh* Article of this Allegation, the trustees of the poor for the ancient parish of St. John at Hackney, are authorized in certain cases, if they think proper, to compound with the landlords or owners of houses, tenements, and hereditaments, for the payment of the poor rates “at such reduced yearly rentals as the said trustees or any seven or more of them shall think reasonable, so that such houses, tenements, and hereditaments be not rated at less than one-half, nor more than two-thirds of the rack rent at which the same shall be let, or the annual value of the premises respectively.” That by the said act the trustees are also empowered, if they think proper to agree and compound the said poor-rate with the landlords or owners of all houses, tenements, and hereditaments, the yearly rent of which does not exceed the sum of 20*l.* at any reduced sum which may be mutually agreed between them. That many landlords and owners of houses in the said parish have, under the provisions of the said act, compounded with the said trustees of the poor in the manner as aforesaid, and that there are in the parish of Hackney alone, nearly one thousand houses rated to the poor-rate under such composition. That in assessing the church-rate, libellate in this cause all the houses in the said parish were rated upon the principle of the poor-rate under the said act, and that the said W. V. and R. M. or one of them, have or has admitted or declared to that or the like effect, &c.

Eleventh.—That although the names of the tenants of the said compounded houses are inserted in the church-rate book, and a certain assessment affixed to each of them, yet that it is not such

tenants but their landlords who are applied to for payment of the said rate. That although the said assessment in the church-rate book is in itself below the real, actual, and proper value of such houses, and below their estimated rental in the poor-rate book, yet that in fact the landlords of the said houses, or most or many of them, do not pay the church-rates according to such assessment, but according to the reduced compounded assessment as contained in the said poor-rate book, under the aforesaid act of Parliament. That sixteen houses belonging to J. B. a parishioner, of the actual yearly rental of 120*l.* or 140*l.*, or thereabouts, and estimated in the poor-rate book at the rental of 104*l.*, are assessed in the church-rate book at 100*l.*, and are charged in the rate at twopence in the pound at the sum of 16*s.* 8*d.*; but that although such sum is entered in the said church-rate book as having been paid in respect of the said houses, yet that the said J. B. did not actually pay more than 7*s.* 2*d.*, being the amount due from him for the said houses upon the compounded poor-rate assessment, made under the said act of Parliament, &c.

Twelfth.—That seven houses situate, &c., belonging to J. P. are estimated in the poor-rate book at 44*l.*, but are assessed to the church-rate at 28*l.* only. That three houses, &c. belonging to J. R. of the estimated rental in the poor-rate book of 21*l.*, are assessed to the church-rate at 12*l.* only. That eight houses, &c., belonging to J. C., estimated in the poor book at 42*l.*, are assessed to the church-rate at 24*l.* That six houses, &c. belonging to W. L., estimated in the poor book at 70*l.*, are assessed to the church-rate at 36*l.* only. That fourteen

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houses, &c. belonging to S. F. estimated in the poor book at 91*l.*, are assessed to the church-rate at 47*l.* only. That in like manner, seven houses belonging to S. B. are estimated in the poor book at 34*l.*, but assessed to the church-rate at 18*l.* That five houses belonging to J. S., and estimated in the poor book at 48*l.*, are assessed to the church-rate at 30*l.* only. That nine belonging to W. S., estimated in the poor book at 63*l.*, are assessed to the church-rate at 40*l.* That fifteen belonging to T. D. are estimated in the poor book at 100*l.*, but are assessed to the church-rate at 75*l.* That three houses, &c. belonging to T. L. B. are estimated in the poor book at 24*l.*, but assessed to the church-rate at 13*l.* only. And in supply of proof, the party proponent craves leave to refer to the original poor-rate book, and to the original rate book, &c. to be produced in this suit. And the party proponent does expressly allege and propound that the estimated rentals of the said several houses as contained in the said poor-rate book, and much more as assessed to the said church-rate, are much below the actual rentals of the same, &c.

This Allegation was opposed by *Addams*.

The *Queen's Advocate* and *Bayford* argued in support of it.

JUDGMENT.

DR. LUSHINGTON.

Before I proceed to consider the main questions which have been raised in this case, I think it right, to prevent all possible misunderstanding, to advert to a matter which was discussed at some length at the Bar, I allude to the *smallness of the amount* sought to be recovered by the present proceedings; now I wish to state in the clearest and most distinct terms that this circumstance does not, and cannot in the slightest degree affect the consideration or decision of the case; I, in the discharge of my duty, am bound to bestow the same labour and care in ascertaining what the law is, whether the rate sued for is three shillings and fourpence, or five hundred times that amount, and having to the best of my power ascertained the law, to pronounce my decision for or against the rate according to my conviction of what the law is.

This suit is brought by persons who represent themselves to be the churchwardens of St. John's Hackney, and the libel pleads, in the common form, the necessity for a church-rate, and the making of it; assuming the facts stated therein to be true, the rate would be a legal rate, and the defendant bound to pay the sum assessed. But the defendant has offered this defensive Allegation, which purports *in substance* to controvert some of the most material facts alleged in the libel; I say *in substance*, because it does not do so in form, and I am certainly of opinion that the question of law might have been more conveniently raised by pleading the facts in a somewhat different shape.

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The allegation also purports to state other matters, besides contradicting the libel, which it is contended would be a bar even if the facts pleaded in the libel were true, the plea is, therefore, twofold, in part denying the averments in the libel, and, in other parts, even admitting them to be true, avoiding them.

I must then, according to the well known rule, assume the *specific facts* stated in this Allegation to be true, and then determine whether, if proved as laid, they would form a good defence to the suit.

The *first* objection to which I shall direct my attention is, that by virtue of the Local Act of the 30 Geo. 3, c. 71, the rate ought to be made by the trustees, and, therefore, laid on the whole of the ancient parish, and not on any particular part of it. To understand and decide this point, we must look at the facts and consider the law as it stood prior to 1790, the date of the local act. Prior to 1790, the whole of Hackney formed one parish, in which stood the ancient parish church, the parishioners of the whole parish were bound to repair that church, that is the body of it, and this obligation was imposed not by the ecclesiastical law, but by custom; by the common law of England recognised by various statutes. It is not the ecclesiastical law which imposes such burthen, for by the ancient ecclesiastical law, the expense arising from such burthen was to be defrayed out of ecclesiastical profits, neither could the ecclesiastical law alone have produced any such effect, because that law, unless recognised by the common law, or enacted as law by statute, was, and is wholly inoperative in

this country. This obligation to repair as imposed by the common law is recognised by all the common law authorities, by Lord Coke, and, indeed, before him, down to and including Lord Chief Justice Tindal and the Judges of the Court of Exchequer Chamber in *Veley and Joslin v. Burder*; (a) the obligation is further recognised by various statutes from the time of Edward the First down to the present day. In the statute *circumspecte agatis*, the statute *ne rector prosternat arbores*, and all the acts of Parliament of modern times touching the collection of rates before magistrates. I speak of the legal obligation to repair and not of the mode by which such obligation should be fulfilled or enforced. This then being a common law obligation, can only be altered by an act of Parliament, and the first question I have to solve is, what is the effect of the local act of the 30 Geo. 3?

The *title* of the act, and especially the nineteenth section, prove that the new church was to be substituted for the old, as the parish church, and, consequently, so becoming the parish church, stood in the same legal position as to repairs and otherwise as the ancient parish church had done, save so far as any alteration might have been effected by the statute. The very title of the act shews what the intent and meaning was, it is "an act for taking down the church and the tower belonging to the parish of St. John, at Hackney, in the county of Middlesex, and for building another church and tower, for the use of the said parish, and for making an additional cemetery or churchyard," and the nineteenth section of the act states, that after the

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(a) 12 Ad. & Ell. p. 265.

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church is completely finished and consecrated, it shall for ever be called and known by the name of the parish church and churchyard of St. John's Hackney; and further, that it shall be used for all the same purposes as the ancient parish church had been accustomed to be used for." There cannot, therefore, be a doubt but that the new church is simply substituted for the old church, and as I have already said, except as altered by the act, it stood in precisely the same legal position.

Now it is not contended that there is any express enactment in this statute whereby the rates for repairs or expenses legally incidental to the office of churchwarden were to be made by the trustees. Repairs are not mentioned so far as I am aware throughout the statute. Then if there be no *direct* alteration of the law, such alteration can only be effected by necessary implication. Does it follow as a plain inference from other parts of the statute? So far as I understand the argument, this conclusion is to be drawn from the twenty-first section, which vests the new church in the trustees during the continuance of the rates to be levied by virtue of the act. The rates imposed by the act for defraying the expenses of building the church, are essentially different from ordinary church-rates in very many particulars which it is not necessary to specify, but I do not perceive, upon what sound principle of law or reason, it can be contended that the vesting the church in the trustees for a certain term, can alter the common law as to the burthen of repairs or the mode of rating, whereby the monies are to be raised; why should the trustees have the burthen cast upon them any more than upon the incumbent, before the passing of this act,

or after the rates were payed and the church vested in him and the churchwardens? It cannot be on account of any profits, benefits, or emoluments, for those were in the incumbent before, and yet he was not liable, and, moreover, there are none such vested in the trustees.

If I understand the argument correctly it is this, that the custom of the parish repairing the nave existed only in relief of the incumbent, and not in former times in relief of the church funds when they were not appropriated wholly to the incumbent but paid according to ancient divisions. This circumstance appears to me rather a fit subject for antiquarian research than legal investigation, for even if the fact were true that the custom of the parish repairing arose only where the repairs would otherwise have fallen solely on the incumbent, *who also received the whole emoluments*, and for his relief, it would not follow, that the mere vesting of the freehold in the trustees with none of the profits would render them liable and exonerate the parish, or give them the power to make a rate for such purposes. I think it unnecessary to follow this point further, it does not come within the principle of *cessante ratione cessat lex*, nor has any authority been cited to prove what would have been in the first instance indispensable, namely, that the sole reason of the custom was the relief of the incumbent. So far then as I have hitherto examined the act of the 30 Geo. 3, there is no ground for holding that the ordinary liability was taken away either by express words or necessary implication; there are, however, some other parts of the act which I think it my duty to notice.

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The 23rd section enacts, “that certain accustomed dues for burials shall be received at the new church and be applied by the churchwardens in aid of the church-rate.” What rate?—the trustees’ rate or the church-rate made in the ordinary form? In order to sift this question, I must refer to the subsequent sections; by the 24th, the pew-rents; by the 27th, the fees for burials, are to be applied, first, to the trustees’ rates; secondly, to the church-rate of the parish. Here then the statute makes an obvious distinction as to the three different species of emolument, giving the first *instantly* to the *church-rate*; the *two remaining* only where the rates imposed by the act are at an end, clearly therefore contemplating, *two contemporary rates*, and consequently repelling all inference that common church-rates were to cease at all for any period; it is true that at the commencement of the 29th section, words are used which apparently contemplate the application of the first set of burial fees to the *purposes of the act*, but a mere statement of an inducement cannot affect the clear terms of the other sections. I am of opinion therefore, that this act has not repealed ordinary church-rates during the existence of the trustees’ rates, and that, therefore, the objection that the *trustees* ought to have made the rate for repairs and expenses incidental to Divine Service falls to the ground.

The next objection is, that the rate though made by the churchwardens ought to have extended over the whole parish, as it stood when the new church was erected; no doubt such was the law and the practice when this new church was first consecrated, but in virtue of the Church Building Acts, the 58

and 59 Geo. 3, the original parish has been divided into three separate parishes, and if there be any alteration of the limits over which the church-rate originally extended it must be by virtue of the provisions of those acts. It has been no easy task to discover the true meaning of the Local Act, but that act is light itself compared with the obscurity of the Church Building Statutes, to which I must now apply myself.

At the period of making the rate in dispute, Dr. Watson, the incumbent, at the time of the division, was dead ; consequently without adverting to any previous resignations, the division into distinct parishes had completely taken effect by the 16th section of the statute 58 Geo. 3. Does the act then provide that the church-rate of such distinct parish shall be levied on the *divided parish only*, or does it not ? if it does not, the old common law remains unaltered.

First then the 16th section declares, that the parish may be divided into two or more distinct parishes *for all ecclesiastical purposes whatever* ; the true question is, whether by those words a necessary implication was raised that the old common law was altered and the rate confined to the curtailed parish, certainly it is most inconvenient that so important a matter should be left to interpretation and construction without any express enactment, but so it is, and I must now see whether the true meaning of this section is helped out by any of the subsequent enactments. The enactments which in any degree affect the question are the 31st, the 70th, and the 71st sections of the 58 Geo. 3, and the 20th section of the 3 Geo. 4. It was naturally to be ex-

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pected that the 31st section would be followed up by some distinct enactment: *no such thing is to be found*. Looking at all these enactments, I confess I feel very great difficulty and embarrassment. Had the case stood upon the 16th section, the path would have been more easy, but the 31st created the great obscurity. I am compelled to say, that the 70th and 71st sections rather assume that it had been enacted that separate and distinct parishes should each have their own rates than that the statute actually does so; on the whole, however, nothing doubting the intention of the legislature, but hesitating greatly as to the expression of that intention, I think, that from the *time of the division* being complete under the 16th section, the rates must be made for each separate division, or otherwise this consequence would follow that a district parish would be exempt from the repairs of the mother church at the end of twenty years, a separate parish never; such a consequence as this appears to me to be repugnant to all the principles on which the Church Building Acts are founded and inconsistent with some of their plainest provisions; for this reason I hold myself justified, not in raising up an enactment which does not exist at all, but in giving doubtful enactments such a construction as shall not manifestly violate other clearly expressed intentions of the legislature.

Having thus declared my opinion that the rate ought not to be made by the trustees, and that it ought not to extend over the whole original parish, the question which immediately follows is, as to whether the churchwardens were duly appointed, and are the proper persons to sue.

Now, several of the articles go to shew that churchwardens elected by the inhabitants of one division cannot act as trustees, or discharge divers duties under the Local Act of 30 Geo. 3. This may or may not be the case, and on such questions I give no opinion, for it does not belong to me to decide them: the sole question for me to determine is, whether they are legal churchwardens of the division of St. John, and entitled to sue in this cause.

On a question so important as this, it might reasonably have been expected there should have been some legislative declaration, but I am aware of none, and the intent of the legislature is again to be painfully collected by inference only from the effect of other enactments; now the 73rd section gives the power to appoint churchwardens to the new churches; and the 71st section directs that districts, though liable for twenty years to the mother church, shall, at the end of that time, make their rates, *as if a separate parish*, and that must mean by the churchwardens chosen by the inhabitants of the division assessed.

The statute 1 & 2 Wm. 4, c. 38, ss. 23 and 25, throw some light on the meaning of the words separate and distinct parish, but then the words are altered to spiritual purposes.

It is admitted by the highest Courts, that in construing acts of Parliament in cases of difficulty, that construction ought to be taken which prevents consequences which the legislature could not have intended. The Parliament could hardly have intended such an anomaly as that churchwardens

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should be chosen by the inhabitants of a district under the 73rd section, and also of a distinct parish under the 1 & 2 Wm. 4, and yet not so chosen by the inhabitants in any divided parish under the Church Building Acts; I think, therefore, that I must adopt the interpretation which would avoid such a discrepancy, and hold that by virtue of the 16th section of 58 Geo. 3, and also the 73rd, the churchwardens for the purposes of rates and repairs are properly elected by the inhabitants of the curtailed parish, I say for rates and repairs only, and give no opinion as to the rest. I hold these churchwardens to be duly elected as to this suit.

If I am correct in this position, I apprehend that the objection on the score of want of notice under the Vestry Acts falls to the ground, for if the electors are the inhabitants of St. John's Hackney only, I do not find it alleged, nor do I believe it was argued, that proper notice was not given.

I now proceed to a class of objections of a different character. The objections I am now about to consider are in effect denials of the facts pleaded in the libel.

First.—That the churchwardens either had or might have had funds in their hands applicable to church repairs, and therefore that this rate was not necessary, as alleged in the libel. I hold there to be a wide distinction in law between the actual possession of funds and a power of acquiring them. I hold that if I found the churchwardens in actual possession of funds clearly applicable to church-rate, and sufficient, if so applied, to render a rate unnecessary, I should be bound to pronounce against

the validity of a rate made under those circumstances, for it is absolutely essential to the validity of a rate that it should be necessary, but I do not find it so pleaded; therefore I dismiss from my mind every consideration of the case on the ground of possession of funds, though I must observe that the question I am about to discuss is not very explicitly raised by the facts contained in the Allegation; still, as the objection has been much pressed in argument, I will consider what is the law where it is pleaded that the churchwardens *might*, if they had done their duty, have had funds, though in fact they have not. I am of opinion that the course to be pursued by the Court would entirely depend on the circumstances of each particular case. If they had a rate uncollected, a case put in argument, such uncollected rate being sufficient, I should certainly refuse to recognise the validity of a new rate; but if the supposed fund consisted of monies belonging to an estate given for the benefit of the church, or in aid of church-rate, I should say that I have no jurisdiction over the churchwardens in their character of trustees, and that all such questions are within the cognizance of other tribunals, which alone could afford a remedy. So I should say also in any cases of doubt or difficulty, for the church must not fall down, or necessities for Divine Service be wanting, till difficult questions of law of this kind are decided.

Then as to the alleged fund; it certainly is my opinion, that if there were any ancient and accustomed dues, as mentioned in the Local Act, such dues are, by the 23rd section of the Local Act, to be applied in aid of this church-rate, but I have no

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jurisdiction to determine, if the custom were denied, whether there are any such dues, nor what they are, nor could I enforce the payment: all these are matters for Courts of Common Law to determine. Tables of fees confirmed by the ordinary will not constitute legal fees; they may be convenient as a guide to parishes with regard to the amount of monies which the ordinary thinks it proper should be taken for matters *not of right* with relation to burial or otherwise, but legal fees can exist only by immemorial usage, or be created by the authority of acts of Parliament; then how can I hold that the possibility of the churchwardens receiving some fees, I know not what, will prevent the necessity of a church-rate, and invalidate it? I have not even the jurisdiction to compel the churchwardens to act in this matter, for how can I compel them to adopt measures which would involve them in litigation in other Courts? I cannot pronounce a rate excessive on this ground.

I have had quite enough to do in disposing of the questions necessary to be considered in this case, without going out of my way to hunt for others, and therefore I conclude, that the averment that the estimate is excessive referred only to the facts before pleaded, and not to any of the items themselves, and I am entitled so to do both from the shape of the Allegation, and because also no objection to any particular item was taken by the counsel.

Where occupiers are assessed to the church-rate, it is unimportant by whom the payment is made.

The last class of objections is to the *rate itself*. It is first said that the rate is illegal, because, though the occupiers are assessed, the landlords of a large class are the persons universally called upon

to pay, and this case is compared to a church-rate, apparently prospective, but really retrospective, but the cases are wholly different; the rate ought to be laid on every occupier, and he is legally liable, and it is not of the slightest importance to whom the churchwardens apply for payment. In *Thompson and Sandford v. Cooper*, (a), Sir William Wynne held that the landlords might be rated; I mention that case, because, till reversed, it would be binding on me, not that I concur in the doctrine laid down, which, if followed out, would take from all church-rates all certainty and precision, and without special custom being pleaded, sanction different modes of rating throughout the whole kingdom; — I cannot, therefore, sustain this objection.

Then does the Allegation state sufficient facts to show that the rate has been *unequally assessed*? If there be a clear inequality, no doubt it would vitiate the rate; if the inequality were slight, it would not, for it is impossible to rate all properties with absolute precision, and there will be difference of opinion as to annual value: what such an Allegation ought to state amongst other things is this, that various properties, specifying them, are not rated according to the same principle of valuation with other properties assessed in the same rate: these Articles do no such thing, there is no such distinct averment to be found. There is an averment, that however rated in the church-rate books, the persons refused to pay according to the *principle* of the poor-rate, a fact which could not

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An averment of inequality in a church-rate must be plain and clear. A slight inequality will not vitiate a church-rate.

(a) 3 Phill. 640.

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invalidate the rate, if true ; there is an averment, that as to some of the houses, they are *estimated* at one sum in the poor-rates and rated at another in the church-rates, but they are not *rated* in the poor-rate according to the gross estimated value, but on different principles ; how am I to conclude that the gross estimated sum in the poor-rate is the proper valuation for the church-rate and so adopted in other cases ?—it is not so pleaded, it is not so argued ; but it is pleaded that it is too low. These Articles raise nothing but issues which may be wholly irrelevant to the question, and which would decide nothing as to the inequality of rating. I presume, from the heading of the rate-book, that the poor-rate was made in pursuance of the 6 & 7 Wm. IV., c. 96, and the Local Act ; that act of Wm. IV. requires the rating to be upon the net annual value, and not on the estimated value, and yet the estimated value is referred to in these Articles, and then it is pleaded that the estimated value is below the actual rental ; suppose it is so, unless the rest of the parish were rated on a higher scale, *which is not pleaded*, the rate would not be unequal. No explanation of all these matters has been offered by counsel, scarcely an argument even to prove the rate unequal. The case of *Chesterton v. Farlar* (a) was cited, but that was a totally different case ; in that case, I did not reject the Articles explanatory of the mode of making the church-rate, because they were inadmissible, but because the plaintiffs had pleaded and admitted that the rate was retrospective, consequently in my opinion could not

(a) Vol. 1, 345. 367. 371 ; and 2 Moore's P. C. Cases, p. 330.

substantiate the rate and succeed in the cause; in fact, they had pleaded themselves out of Court: it appeared to me, therefore, according to my conception of the practice in these Courts, and strictly conformable with justice, that plaintiffs who on their own showing, by their pleading, could not possibly recover, should not be permitted to go into issues on minor points, which, however decided, could never affect the ultimate decision of the case; in giving my opinion on that case, I did say that all property ought to be rated, and so in strictness it ought, though the occupiers of property may, under certain circumstances, be excused from payment; were it otherwise, a rich man occupying a cottage might be excused, and all cottage property exempted for the benefit of the landlord.

On the whole, I am satisfied that these Articles do not raise in any issuable shape the question of inequality of rate,—inequality is a legal defence, but the averment must be plain, clear, and capable of being tried,—these Articles do not do so, and I must reject them.

I believe I have considered every point of law which can possibly arise from these facts, and I am of opinion, that if the Articles as laid were all proved, they would furnish no legal defence to the action, and therefore I reject the Allegation.

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Still and Bunn against Palfrey.

Suit for church-rate.
 Objection :—
First, that the proceeding was for six rates at the same time, *overruled*.
Second, that the rates were made by persons delegated by the parishioners in vestry, but not made in vestry, *overruled*.
Third, that the minister's salary was included in the rate, such salary amounting to one-third of the whole rate, *sustained*.

This was a question as to the admissibility of a libel in a suit of subtraction of church-rate, brought in this Court by letters of request from the Commissary of Canterbury, by Messrs. Still and Bunn, the churchwardens of the parish of St. Mary the Virgin, Dover, against Daniel Palfrey, a parishioner; the circumstances of the case are fully set forth in the judgment of the Court.

The libel was opposed by *Phillimore* and *Harding*, and supported by *Burnaby* and *Nicholl*.

SIR HERBERT JENNER.

This is a cause of subtraction of church-rate; and the question before the Court is, whether or not the libel given in is admissible? The libel is for the recovery of no fewer than six rates, four of them more particularly called church-rates, the other two in point of fact are rates made for repayment of money for the purchase of a cemetery by the parish, and the rates for this latter purpose are not opposed.

The whole libel is opposed, together with the additional Articles, which were brought in for the purpose of giving more information to the Court than was originally contained in the libel.

The circumstances of this parish of St. Mary, Dover, are peculiar, and the course of proceeding in the parish for making the rates is also peculiar, and although it appears that the rates have been made in this manner for a very long period, their validity has never before been called in question, still, when parties are called on to pay the rates, they are at liberty to take any objection, and have their objection considered by the Court, and the weight given to it which it merits.

The case comes here by letters of request, and the parties to the suit are the churchwardens of the parish, who sue in their official capacity, they describe themselves as the successors of Saunders and Hall, who were the successors in office of T. H. E. and K. H., the successors of T. S. and T. W., respectively, churchwardens at the times when the several rates were made. The other party is described as a parishioner of this parish. The consequence of including all these rates in one proceeding is, that it has given rise to proceedings which, if the rates can be maintained, may be attended with considerable expense. The libel consists of thirty-five Articles and Exhibits, additional Articles have been given in with ten Exhibits. If there is a valid objection, the suit ought to be stopped in *limine*, before any great expense is incurred.

The objections to the libel are three in number :

First.—That some of the rates are of long standing, and that with respect to them, the suit, if at all, ought to have been brought long ago.

Second. — That the rates were not made in vestry.

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Third.—That some of the purposes for which they were made are not the subjects of church-rate.

With regard to the first objection. This circumstance was very properly brought to the notice of the Court, as introductive not only of great inconvenience to the party proceeded against, but also to the parishioners called on to pay the rate. It may turn out that the rate is illegal, and then the parties who have paid will have paid money in their own wrong. Still, notwithstanding this, the Court is not at liberty to say that it will not entertain the suit for these rates, but it must be understood by churchwardens that the Court will not be inclined to give them assistance, if they do not take the earliest opportunity of recovering rates when parties give notice that they will not pay them. In this case there is some excuse: many causes have been pending here and elsewhere, which may have deterred parties from bringing forward questions so early as they otherwise might have done. Whatever the reasons were, the delay is not attributable to these churchwardens, but to their predecessors.

The second head of objection is to the manner in which the rate has been made. It is said that the mode of making the rate is not legal, that it was not made in vestry, but by a certain number of the parishioners appointed in vestry to audit the accounts of the churchwardens and to make a rate. This objection applies to the whole four rates in principle, for although the sums differ in amount, I apprehend that they were all made in the same manner, therefore, this objection may be considered as applying to the whole libel.

The mode of proceeding appears to have been this; the first Article of the libel pleads the making the rate in 1837, and the proceeding seems to have been in this shape: certain repairs are stated to be necessary, and the churchwardens wanting funds to do the repairs, due notice is given, calling the parishioners to meet to appoint persons to audit the churchwarden's accounts, and to make a church-rate. A meeting is held, at that meeting twelve parishioners are nominated and appointed, and they, or any five of them, are authorized to audit the accounts; and also according to the ancient usage and constant practice of the parish, to make a church-rate. According to this statement, the parishioners were duly assembled for these purposes, and those persons, being twelve in number, were specially appointed to make a church-rate, on the Thursday next following, according to the ancient usage and practice in this parish. It seems that on that day the parishioners so nominated met in vestry, there were present five of them, and the churchwardens whose accounts were to be audited, attended, and in their presence a rate was made; or an assessment for the repair of the church; that the churchwardens were present at such meeting and were consenting to such rate.

The other Articles plead in the usual form the making of the rate, the demand made on the parishioner, his refusal to pay, and the summons before magistrates; that Mr. Palfrey at this time occupied premises rated at the sum of 14s. 6d., the sum sued for; and annexed is a copy of the original rate so made. The same course of proceeding was adopted on the other occasions, in 1838, 1839,

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1840 ; as to two of these rates, it is objected that they were for two of the years then at an end. The amount required for these repairs were greater in some years and less in others. And also a greater or less number of parishioners were nominated to make the rate. Also on one occasion in 1840, it is pleaded, that Mr. Palfrey, then one of the auditors, gave notice of a motion to be brought forward at the vestry, to rescind the resolution of the vestry, insomuch at least as it empowered the churchwardens to make a rate, and to order that no church-rate be allowed until it had received the sanction of the parishioners in vestry assembled ; that motion was, however, negatived, and an amendment carried that the ancient and constant practice of the parish be adhered to. This was accordingly done, and the rate made ; in point of fact, it was made by the resolution to adhere to the practice of many years.

Now, the motion made by Mr. Palfrey was not improper, nor was it in itself unreasonable. The practice in this parish was contrary to what is customary in most parishes, and it would have been perhaps the most desirable course that after the accounts of the churchwardens had been audited, the parishioners should have passed the accounts, and should have themselves made the rate. Still the question has been raised, and must be considered, whether the custom is such as to render the rate invalid.

Now it was objected that this was a rate not made in vestry, and that no rate can be good and valid unless made by the parishioners in vestry assembled, unless made by a select vestry, or by prescription from

time immemorial. It is certainly not alleged that there has been an immemorial custom in this parish ; and it was argued that if immemorial custom be not pleaded it is of no avail to allege constant and ancient usage. I do not entirely agree with this argument, although no immemorial custom is set up as to the mode of making the rate, yet the rate is made, as it is said, according to what has been for many years the ancient practice ; the parishioners were not taken by surprise, no novel mode was adopted, the ancient and constant practice was adhered to, and it may be considered not an inconvenient mode. The burthen is cast by law on the parishioners of repairing the parish church and providing those things which are necessary for Divine Worship ; this practice may be considered as a bye-law made *pro re nata*, that no fixed number but a certain number of the parishioners should be selected to make the rate as being an arrangement most convenient to the time and employment of the others, and this may be considered as in the nature of a bye-law. As it is stated by Lord Chief Justice Tindal, in the *Braintree case*, (a) a parish is a corporation aggregate, as far as regards the making of rates for the repair of the church, and “ the power of making bye-laws is incident to corporations aggregate,” and he says, that “ Lord Coke lays it expressly down, that the inhabitants of a town may, without custom, make ordinances or bye-laws for the reparation of the church, or highways, or any such thing, which is for the general good of the public ; and in such cases the greater part shall

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(a) 12 Add. & Ell. 265.

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bind the whole without any custom." I do not, therefore, see anything improper in the mode adopted. If these persons had taken upon themselves to assemble and make a rate, without the authority imparted to them by a majority of the parishioners, the case would fall within the principle acted on in the *Braintree case*, where a rate was made by a portion of the parishioners not authorized to do so, and no notice having been given to the parish. This difference essentially distinguishes this case from a case where churchwardens had taken upon themselves to make a rate of their own authority, that here certain persons were appointed for the special purpose by the whole body of the parishioners, notice having been duly given. Where a notice is duly given, the whole body are present or consenting to what is done by those present. Here notice was duly given for the purpose for which the parishioners were to assemble, namely, to appoint persons to make a church-rate; the parishioners were not taken by surprise, it was simply following the previous course adopted for many years. If the whole case rested on these two objections, the Court would be bound to admit the libel, and if it was proved to pronounce for the validity of the rate. But there is another objection, with respect to which I have great difficulty: it is this, that a considerable part of this rate is to be applied to the payment of the minister's stipend. The heading of the rate is, that it is "for and towards the necessary repairs of the church and payment of the stipend, maintenance, or salary of the minister, &c.," and the question is, whether the providing for the salary of the minister is a legal subject of church-rate.

Additional Articles were given in, and they state that for many years the minister's salary has been paid out of the church-rate. That in 1817, Mr. Maule, who had previously been the assistant minister was elected minister by the inhabitants of this parish, to whom the patronage belongs, at an annual stipend of 200*l.* in addition to surplice fees; that this stipend has ever since been paid him out of the church-rate. The stipend to the other ministers varied, but was paid in the same manner, and the sums for that purpose were allowed in the church-wardens' accounts. It is not a usual mode of providing for the payment of the minister of a church to make his stipend an item in a church-rate.

The circumstances of this parish are peculiar, the additional Articles plead, "that the church of St. Mary the Virgin, in Dover, is a very ancient edifice, of Saxon origin, belonging to and in the patronage of the inhabitants of the parish in whom (in vestry assembled) the election of the minister is vested; that the duty of providing and paying a stipend to a minister for performing the spiritual duties of the parish hath at all times been incident to the possession and patronage of the church; that there are no tithes or glebe, and the minister, besides Easter Offerings, and fees for occasional duty (which together are of small amount), receives a yearly stipend from the inhabitants, the amount whereof is agreed upon at the time of his appointment." And a variety of Exhibits were annexed to shew the mode in which the stipend had been paid out of the church-rates. The question is, the objection being now taken, whether the rate for such purpose can be maintained. The true character of this pre-

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ferment is not very accurately defined, I can form no notion how the parishioners became possessed of the patronage, or when for the first time it was given to them, whether the right of patronage came to them on the dissolution of the monasteries, or when it was : all that the Court can collect is, that it is neither a rectory or a vicarage ; there is no endowment—no tithes, the minister is not instituted or inducted ; and whether he is licensed by the bishop is not set forth, though I presume, that it must be so, as the churchwardens come in the usual course to the Commissary Court to confirm the rate.

Now the libel pleads that the minister's stipend is always collected with the rate for the repair of the church ; I apprehend, however, that there were two rates originally,—one for the minister,—one for the church. The first of the Exhibits, dated 1611, states, " The accounts of Thomas Obree and Richard Dawkes, churchwardens, were audited, as was the book for the minister's wages," so that it would seem the accounts were kept separate ; it is clear that separate books were kept, one for the minister's wages, the other for the general appropriation to repairs of the church ; in subsequent years, however, the plan of collecting separately was abandoned, and one sum collected, from which the minister's stipend was paid ; this has been the course since 1817. The amount of 200*l.* out of 600*l.* is very considerable, it is one-third of the whole sum. The repair of the fabric of the church, and the providing necessities for Divine Worship, are the purposes to which church-rates are more immediately applicable ; but it may be said that

this parish is very differently situated from others, as it undoubtedly is. The parishioners are bound to provide a minister ; whether the parish receives the tithes or not, they are the patrons, and, as such, are bound to provide a minister, and are bound to pay him ; and it may be said that it can make little difference whether the rate is collected by the churchwardens as a church-rate, or a separate rate ; it would so seem at first sight, and Mr. Palfrey could receive no prejudice by being assessed in one form or the other. I should be very much inclined to adopt this view of the case, if there were not this distinction, that if this is not a legal charge in a church-rate, this Court has no power to enforce the payment of the minister's stipend, as part of a church-rate. It is a different thing for the Court to entertain a suit for ecclesiastical dues to the minister *eo nomine*, and to enforce payment of such dues as part of a church-rate. Cases were cited to show that ecclesiastical dues could be enforced in the Ecclesiastical Court. In *Gilby v. Williams*, (a) where it was pleaded that for twenty years dues had been paid, a prohibition to the Ecclesiastical Court was denied.

In *Gooch v. The Bishop of London*, (b) a prohibition was denied to the Ecclesiastical Court, and on this ground, that it was not necessary for the bishop to claim, by immemorial custom or prescription, but *ex antiquo*, and that in such a case the Ecclesiastical Court might proceed.

These cases are very strong to show that ecclesiastical dues may be sued for in a Spiritual Court,

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(a) Cro. Jac. 666.

(b) 2 Stra. 879.

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but they do not show that they may be sued for under the name of subtraction of church-rate; no case has been cited where such a charge has been enforced as part of a church-rate. I am not prepared to say that it is a purpose for which a church-rate can be made; I cannot say that if all the facts stated in the libel were proved, that I could enforce this rate. It may involve this parish in considerable expense. The parishioners cannot escape from the duty of providing a minister. They may be subject to an action of assumpsit, or other means for compelling them to find sufficient funds from some source or other for paying his stipend to the minister.

I am, therefore, of opinion that I cannot enforce this payment in a suit of this description: as to what the powers of the Court may be in a suit of a different description, I give no opinion. I reject all the Articles of the libel which refer to this part of the case: the libel must be reformed.

The libel was subsequently brought in and admitted as reformed. The defendant paid the cemetery-rates, and the proctor for the churchwardens declared he proceeded no further.

The Court being of opinion that both parties were in error, condemned the churchwardens in the costs which related to the church-rates, and the defendant in the costs occasioned by his refusal to pay the cemetery-rates.

PREROGATIVE COURT OF CANTERBURY.

In the Goods of Lieut. Gen. THORNTON, deceased. 1841.

Dec. 6th.

The testator left a will and a codicil dated 13th of October, 1838; and on the 25th of October, 1841, a further codicil was drawn up for execution, but there not being space left sufficient for the names of the witnesses and the testator's seal, a fresh copy of the codicil was made, which was executed by the testator, and duly attested by two witnesses. This latter executed codicil was then, as it was supposed, enclosed in an envelope; and the first prepared copy, burnt.

Probate
allowed of a
copy of a duly
executed
codicil which
had been burnt
by mistake.

Upon the death of the testator, upon opening the envelope, it was discovered that the codicil was not there, and upon search being made the executed codicil could not be found, but the first copy was discovered, which it was supposed had been burnt. Upon an affidavit from T. R. Thornton, Esq., the executor and residuary legatee, and his son, of the above facts, and that they had no doubt that the executed codicil had been burnt by mistake instead of the first copy, and which Mr. Thornton, the son, deposed, was a correct copy of the executed codicil.

Robinson prayed probate of the will and first codicil, and of the copy of the codicil of the 25th of October.

1841.

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In the Goods of
THORNTON.

SIR HERBERT JENNER.

There is full proof of the execution of the codicil of the 25th of October, 1841;—and as far as possible of the fact of the wrong paper being burnt: it is fortunate that the copy has been found, otherwise the Court might have had great difficulty.

Let probate pass of the will and codicil, and of the copy of the last codicil as prayed.

ARCHES COURT OF CANTERBURY.

1841.

Dec. 11th.

Motion to enforce payment of costs in a suit for subtraction of tithes, notwithstanding an appeal, under stat. 32 Hen. 8, c. 7, rejected,—the proceeding in the cause being under the stat. 2 & 3 Edw. 6, c. 13.

FIFE *against* BLUNT.

This was a cause of subtraction of tithes, brought originally in the Commissary Court of Surrey, by the Rev. Henry Blunt, rector of Streatham, against Mr. Henry Fife. It was appealed to this Court, upon the rejection of an Allegation in the Court below, on behalf of Mr. Fife. This Court affirmed the sentence of the Court below, and retained the cause.

The Court, at the hearing of the cause, (11th of November,) pronounced in favour of the party suing for the tithes, and condemned Mr. Fife in costs. On the 1st of December, (the fourth session of Michaelmas Term,) the costs were taxed, and on that day Mr. Fife alleged that he had in due time and place appealed, and he was assigned to prose-

cute his appeal by the first session of the next Term. 1841.

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Addams now (11th of December) prayed that the Court would, notwithstanding the appeal, direct a monition to issue against Mr. Fife for the payment of costs, as it was authorized to do under the stat. 32 Hen. 8, c. 7, (a) the appeal he submitted was merely to cause delay.

SIR HERBERT JENNER.

I agree with the counsel that, looking at the circumstances of the case, the appeal is made merely for delay ; and the Court would feel inclined to direct the costs to be paid under the statute of Henry VIII., but unfortunately the proceeding in this case was not under that statute, but under the statute 2 & 3 Edw. 6, c. 13 ; I therefore do not feel that I am authorized to enforce the costs under the former statute.

(a) The 3rd section of the act is as follows,

“ And in case that any of the parties for any cause or matter concerning that suit do appeal from the sentence, order and definitive judgment of the said ordinary, or other competent judge, as is aforesaid, then the same judge by virtue of this act forthwith upon such appellations made, shall adjudge to the other party the reasonable costs of his suit thereinbefore expended ; and shall compel the same party appellant to satisfy and pay the same costs so adjudged by compulsory process, and censures of the said laws ecclesiastical, taking surety of the other party to whom such costs shall be adjudged and paid, to restore the same costs to the party appellant, if after the principal cause of that suit of appeal shall be adjudged against the same party to whom the same costs shall be yielded,” &c.

1841.

In the Goods of LOGAN MITCHELL, deceased.

Dec. 6th.

A legatee at the request of the testator, signed her name to the will, the testator subsequently duly executed the will in the presence of two witnesses, who attested it, motion to strike out the name of the legatee rejected.

The deceased died on the 16th of November, 1841. Shortly previous to his death, a servant in his house having destroyed herself, he sent for a niece to come to his house ; he soon after made his will, and requested his niece to put her name to it, which she did. She then said to the deceased that she feared she should get into a scrape by signing the will, upon which the deceased sent for two friends, to whom he acknowledged his signature to his will, and they subscribed their names in his presence ; there were some alterations in the will in the deceased's handwriting, and there was no doubt that they were on the paper before the execution.

Haggard prayed probate of the will with the alterations, and that the Court would direct the name of the niece to be struck out, as she might otherwise be considered as an attesting witness, and deprived of the legacy to which she was entitled under the will.

SIR HERBERT JENNER.

There can be no doubt that the second execution of the will was a valid execution ; from the affidavit, it is clear that the alterations were made before the will was executed.

The Court is prayed to strike out the name of the niece, who upon the face of the instrument

would seem to be an attesting witness; the Court cannot do that.

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The proper time to take the objection would be upon a suit being brought for the legacy.

In the Goods of
LOGAN
MITCHELL.

Probate granted of the paper as it stands.

WELLESLEY against VERE and KNOX.

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This was a cause of proving the will of Edward Hope, Esq., deceased, promoted by the Reverend Henry Wellesley, the universal legatee named therein, against J. J. Hope Vere, Esq., the brother, and the Hon. Jane Knox, the sister of the deceased, his next of kin. The testator died on the 4th of November, 1836, a bachelor, leaving property of the value of about 12,000*l*. The paper was dated August 13th, 1822, and was to the following effect, "In the name of God, Amen. I, Edward Hope, do leave and bequeath every thing I possess under the sun to Henry Wellesley, a younger son of the Marquess of Wellesley, who is the brother to the Duke of Wellington." The paper was in the deceased's handwriting, but was not signed at the end, nor attested. A will of the deceased, dated July 27th, 1835, leaving the property to Mr. Wellesley, with the exception of 3000*l*. to Louisa Goddard, the deceased's servant, was pronounced against in a suit in this Court, on the ground of insanity, and the sentence in that case was affirmed on appeal by the Judicial Committee of the Privy

Motion at the hearing of a cause with respect to the validity of a will dated 1822, to import into the cause the proceedings and evidence in a former suit in this Court, respecting the capacity of the deceased in 1835, rejected.

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Council. Two witnesses were examined in support of the will now before the Court, and the cause stood for hearing; no plea had been given in opposition to the will.

Haggard and *Harding* now prayed the Court to import into this suit the proceedings and evidence in the former cause; it was a suit between the parties now before the Court upon the same question, the testamentary capacity of the deceased, and the circumstances and facts proved in that case would shew the real state of the deceased.

Burnaby and *Addams* opposed the application.

SIR HERBERT JENNER.

It appears that the proceedings in this cause have taken their regular course; the will was declared to be opposed by the proctor of Mr. Hope Vere, an Allegation was then given in on the part of Mr. Wellesley propounding the will, upon that Allegation two witnesses have been examined; publication passed of that evidence, no Allegation being given by Mr. Hope Vere against the will; the cause was set down regularly for hearing and the prayer of Mr. Wellesley's proctor is, that the Court would pronounce in favour of the will, and decree administration to his party; and a prayer from Mr. Hope Vere's proctor is before the Court, that I would pronounce that the proctor of Mr. Wellesley has failed in proof of his case, and that the deceased is dead intestate. So the cause stood up to this time, and now for the first time, at this late period of the cause, the Court is prayed to

rescind the conclusion of the cause, in order to admit the evidence in the former cause between Mr. Wellesley, one of the parties, and Mr. Hope Vere, in which a will of 1835 was pronounced against, and the sentence of the Court was affirmed by the Judicial Committee of the Privy Council. Now, although that suit was between the parties now before the Court, it related to a different period of time, and if I were to accede to this application, the whole case must be re-opened. The application is quite a novel one, and if it could be entertained, it certainly ought to have been made at an earlier period. I must reject the application.

The cause was then argued on its merits, and the Court pronounced in favour of the will.

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WELLESLEY
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SCURRAH *against* SCURRAH.

1841.

Dec. 16th.

In this case, a decree was taken out at the suit of R. W. Scurrah, a brother and one of the next of kin of Richard Edward Scurrah, deceased, calling upon his mother, Sarah Scurrah, the mother and administratrix of the deceased, to exhibit an inventory and account of her administration. The deceased died on the 6th of August, 1823, a bachelor, intestate, leaving his mother, who took out letters of administration shortly after the death of the deceased, and his brother and two sisters, the parties entitled in distribution. No proceeding was taken to call for an inventory

An application to compel an administratrix to exhibit an inventory and account after a lapse of eighteen years rejected, and the party making the application, under the circumstances, condemned in costs.

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SCURRAH
against
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and account until a decree was taken out by the brother in August 1841.

The administratrix appeared to the decree, and a petition was entered into on her behalf, praying that she might not be assigned to bring in the inventory and account. It was alleged that the affairs of the deceased were much embarrassed; that the debts exceeded the assets; that being unacquainted with business, her son (the party now proceeding,) assisted her in the management of the deceased's affairs; that he made an account for her of all that had been received and paid relative to the deceased's estate, by which it appeared that she had disbursed 41*l.* more than she had received; and it was submitted, that by reason of the premises and of her great age, being in her eightieth year, she ought not to be called on for a further account.

On the other side it was denied that the estate was much involved, or that the debts of the deceased exceeded his assets, or that the party proceeding had assisted the administratrix in the management of the affairs, &c.

Haggard for the party cited, submitted that the proceeding was a vexatious one, and that the administratrix ought to be dismissed with her costs. He cited *Bowles v. Harvey*. (a)

Jenner, contra. The time that has elapsed and the age of the administratrix, are not a bar to this application. It was stated that the estate was in-

(a) 4 Hagg. E. R. 241.

solvent, the assets, however, were sworn under 300*l.*, but they are now stated to be 614*l.*

The case of *Bowles v. Harvey* is not similar to this; in that case, it was said by the Court that it was impossible to make out an inventory as all the papers were lost. In *Higgins v. Higgins*, (a) after a long delay, although a full inventory was dispensed with, a declaration instead of an inventory was produced.

Here no information is given, we should be satisfied with a declaration.

SIR HERBERT JENNER.

In this case the Court is asked to assign Mrs. Scurrah, the administratrix, to exhibit an inventory and account of the estate and effects of her son, who died in August, 1823, intestate. He left his mother, a brother, and two sisters who were entitled in distribution to his property. The effects of the deceased were sworn under 300*l.* The administration was taken very soon after the death of the deceased, and this application is now made for the first time, in 1841, that is eighteen years after the death of the party.

The Court, under these circumstances, expects some ground to be stated for the application now made. I admit the right of the parties to call for an inventory and account, and that the party called upon cannot allege time as a bar to exhibiting it, but the Court has a discretion, which it exercises, of considering whether, under the particular circumstances of each case, it will assign a party to

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(a) 4 Hagg. E. R. 242.

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exhibit an inventory and account after a lapse of time ; but it must be clearly understood that the Court does not consider time alone a bar to exhibiting an inventory and account.

What then are the circumstances of this case ? administration was taken out immediately after the death of the deceased in 1823. It appears that the son assisted in making out the account of the property of the deceased from the books and the dictation of the administratrix, the account consisting of a statement of one side of debts due from the deceased, on the other of debts due to him in his trade ; this was made out in 1825, two years after administration was taken out. The property was sworn under 300*l.*, but it turns out that when the account was made out by the son (the party now applying to the Court) either from his mother's dictation or assistance, that 604*l.* had been received, so far as could be made out, and payments made to the amount of 653*l.*, shewing a balance in favour of the administratrix, and which balance has been increased to 4*l.* by a further payment of 2*l.*, so that at that time it did not appear that there were any assets to be divided ; but this is not conclusive. It may be that other sums were paid or received ; still the Court expects some good ground to be shewn for exercising its power of compelling the exhibiting of an inventory and account after a lapse of eighteen years. The administratrix is in her eightieth year, she swears that at the time of the death of the deceased, his affairs were very much involved, that his debts exceeded his assets, that she availed herself of the assistance of her son, the party in the cause, to arrange her accounts, and remunerated him

out of her own money ; the account is in the son's handwriting. There is a positive averment in the affidavit of the administratrix that no other money has ever been received, to which the deceased was entitled ; a positive averment of no assets received on her behalf.

What is the statement made by her son, the party before the Court ? That he does not know, but does not believe that the affairs of the deceased were much or at all involved, or that the debts exceeded the assets. The account is not conclusive, but it bears strong marks that the debts exceeded the assets ; the mother's affidavit states that the account as made out was all that the deceased was entitled to. The son goes on to swear " that he hath made several applications for payment of his share of the deceased's assets ;" not one application only, and that he was then satisfied, but " that on several occasions, she informed him that she was entitled to the whole." He made other applications, and received the same answer, he is not satisfied, he makes others, and yet he ventures to swear that he was ignorant that he was entitled to any of the property of the deceased. It exceeds my belief that there was such *crassa ignorantia* ; if there was, he must take the consequences of it. The Court will not, at this length of time after the death of the deceased, the administratrix being in her eightieth year, call upon her to give this account. There is no averment that assets have come to her hands, no reason to believe the estate is not fully administered. There is no ground for the application, and I dismiss the party, and condemn the other party in costs.

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THE END.

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